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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-343
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-344
WISCONSIN BELL, INC.,	File No. E-89-345
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-346
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-347
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-348
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-349

Defendants.

ORDER

Adopted: May 20, 1992; Released: June 1, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Allnet Communications Services, Inc. (Allnet) may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Allnet presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Allnet's damage claims

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] The complainants relied, as does Allnet in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7] Allnet has asked the Commission to direct defendants to provide such computations.

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the MCI and AT&T Liability Orders.[8] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Allnet may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Allnet, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Allnet's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Allnet's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Allnet's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the

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[7] Allnet also seeks interest on this amount as well as attorney's fees and costs. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Allnet's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] *See, e.g.*, Reply of Wisconsin Bell at 9 (filed November 28, 1989).

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Johanna S. DeStefano, File No. 4402-CM-P-83
Ralph V. DeStefano,
James W. Feasel,
Susan L. Gay and
Andrew G. Gay

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on the E-group Channels
at Baltimore, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1922; Released: June 1, 1992

By the Chief, Domestic Facilities Division:

1. This *Memorandum Opinion and Order* concerns a petition to deny filed against the above-referenced application of Johanna and Ralph DeStefano, James Feasel, and Susan and Andrew Gay (collectively referred to as DeStefano) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Baltimore, Maryland area. DeStefano's Baltimore MMDS application was selected for qualification review as the result of a Commission lottery. The petition was filed jointly by United Cable Television Corporation of Baltimore Limited Partnership and United Cable Television Corporation of Baltimore (collectively referred to as United Cable). For the reasons discussed below, we deny the petition.

2. United Cable presents three basic arguments for why the Commission should deny or dismiss DeStefano's Baltimore MMDS application. We will consider them sequentially. DeStefano argues in its reply that United Cable has failed to demonstrate that the MMDS application is not in substantial compliance with the requisite rule requirements. DeStefano requests that United Cable's petition be denied.

3. *Site Availability.* First, United Cable argues that DeStefano failed to provide in its application reasonable assurance of the availability of its proposed transmitter site, as required by Section 21.15(a) of the Commission's Rules, 47 C.F.R. Sec. 21.15(a). In reply, DeStefano argues that it has received reasonable assurance that the transmitter site proposed in its application will be available. Under Section 21.15(a), an MMDS applicant must demonstrate that its proposed transmitter site will be available. When selection between mutually-exclusive applications is by lottery this requirement is considered satisfied "if the application adequately demonstrates *reasonable assurance* of the availability of the site." *Revision of Part 21 of The Commission's Rules,* 2 FCC Rcd 5713, 5721 (1987) (hereinafter cited as *Part 21 Revision)* (emphasis added).

4. As evidence of the availability of its proposed site, DeStefano included, as Exhibit B to its application, an affidavit of Andrew G. Gay, one of the partners of DeStefano. This affidavit states that Jack Deitz, an officer of the corporation owning the proposed site, told Mr. Gay during a telephone conversation that "he would be willing to enter into negotiations" with DeStefano to lease space at the site. DeStefano later filed with the Commission an amendment which included a letter from Mr. Deitz stating that the owner of the proposed site "is willing to enter into a lease" with DeStefano "subject to the granting of a construction permit by the FCC, a favorable engineering study, [and] our approval of your installation." We conclude that, by these submissions, DeStefano adequately demonstrated that it has reasonable assurance of the availability of the transmitter site. *See Krisar, Inc.,* 1 FCC Rcd 1007, 1010 (Com. Car. Bur. 1986). The applicant is reminded, however, that pursuant to *Part 21 Revision,* the applicant must file "concrete evidence" of site availability (*i.e.,* a copy of a lease or an option to lease) prior to grant of its application. 2 FCC Rcd at 5721.

5. *Interference Avoidance Techniques.* The second argument United Cable presents is that DeStefano failed to provide a sufficient showing of what actions the applicant had taken and will take to avoid adjacent and cochannel harmful interference, as required by 47 C.F.R. Sec. 21.901(d)(7). In response, DeStefano states in its reply that its application demonstrates adequate compliance with Section 21.901(d)(7) by listing engineering techniques that have been and will be used to avoid potential harmful interference (Exhibit H). For example, the application provides for the use of engineering techniques, such as adjusting the transmitter power level, antenna pattern cross-polarization, frequency offset and relocation of transmitter sites to resolve interference problems should they occur. In addition, the applicant stated its intent to cooperate with co-channel and adjacent channel operators to avoid interference and to provide the level of interference protection proposed in *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules,* 98 FCC 2d 68 (1984). Based on these statements, we find that DeStefano's description of the efforts it has undertaken and will undertake to resolve cochannel and adjacent channel harmful interference fulfilled the requirements of Section 21.901(d)(7). United Cable's reliance on *Advancom, Inc.,* FCC 85-560, released October 23, 1985, is misplaced. *See also Krisar, Inc.,* 1 FCC Rcd at 1010.

6. *Cut-Off Rule.* As to its third argument, United Cable contends that DeStefano, in an amendment to its application, surreptitiously attempted to increase the proposed antenna height by 10 feet or more, which constitutes a "major" amendment under Section 21.23(c)(2) of the Rules, 47 C.F.R. Sec. 21.23(c)(2). Consequently, DeStefano's application should be treated as "newly filed" under the "cut-off" provision of Section 21.31(e) of the Commission's Rules, 47 C.F.R. Sec. 21.31(e). If treated as "newly filed," the DeStefano application would be dismissed.

7. DeStefano filed two amendments to Exhibit E of its application, the vertical profile sketch of the antenna supporting structure. Contrary to United Cable's contention, these amendments did not increase the proposed transmitting antenna height by ten feet or more. A review of these amendments reveals that the antenna height is unchanged. Therefore, these amendments do not constitute "major" amendments for purposes of the "cut off" rule of Section

21.31(e). Instead, the amendments were for clarification purposes only, in compliance with the requirements imposed by 47 C.F.R. Secs. 1.65, 21.30(a)(3) and (a)(5) that require an applicant to update the information furnished in an application so that the information contained therein is substantially accurate and complete in all significant respects. For these reasons, we do not consider DeStefano's application to be "newly filed."

8. In light of DeStefano's rebuttal, we find United Cable's evidence insufficient to establish the existence of violations of either Section 21.15(a) or 21.901(d)(7) of the Commission's Rules or to establish that DeStefano's application should be treated as "newly filed," pursuant to Section 21.31 of the Commission's Rules. *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)(hereinafter cited as *Astroline); Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont); Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz); see also, Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987); *Heritage Broadcasting Company of North Carolina*, 1 FCC Rcd 1012 (Comm. Car. Bur. 1986); *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Having carefully considered all of the pleadings and evidence submitted by the parties, we find that the allegations raised by United Cable, when read in conjunction with the entire record, are insufficient to raise a substantial or material question of fact. *See Jazz*, 775 F.2d at 394.

9. Accordingly, IT IS ORDERED that the petition filed by United Cable Television Corporation of Baltimore Limited Partnership and United Cable Television Corporation of Baltimore concerning the MMDS application of Johanna and Ralph DeStefano, James Feasel, and Susan and Andrew Gay at Baltimore, Maryland IS DENIED.

10. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. Sec. 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. Sec. 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 26, 1992

Released: June 1, 1992

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. Charles Knerr 8210-AJZ
President, Sound C12-289
Broadcasting Corporation
Licensee, Radio Station KCNA(FM)
1330 Lawn Ridge
Grants Pass, Oregon 97526

Dear Mr. Knerr:

This letter constitutes a NOTICE OF APPARENT LIABILITY for FORFEITURE in the amount of two thousand dollars ($2,000) to Sound Broadcasting Corporation, licensee of Radio Station KCNA(FM), Cave Junction, Oregon, pursuant to Section 503(b) of the Communications Act of 1934, as amended, for its apparent willful violation of Section 73.1206 of the Commmission's Rules.

On August 4, 1989, and September 19, 1989, the Commission inquired into an allegation from radio station KBOY that on July 27, 1989, one of your then-disc jockeys, Guy Kemp, had called radio station KBOY and broadcast the resulting conversation with KBOY's receptionist, Annette Lewis, without her prior knowledge of the intended broadcast use of the conversation. In reply, you provided a notarized affidavit from Matt Roberts, assistant to Guy Kemp, stating that he called KBOY, spoke to its receptionist, informed her that Guy Kemp would be calling her, and obtained her permission to have her conversation with Guy Kemp broadcast. You also provided a tape of the ensuing conversation in which Annette Lewis claimed at one point, "Well, you didn't even tell me I was on the air," to which Guy Kemp replied, "Yes, I told you a couple of times. I said, this is Guy Kemp. Yes I did. You're on the air, you're on the air, you're on the air, you're on the air."

In response to your reply, KBOY General Manager Tom Carnes provided statements of Ms. Lewis, and two former KCNA employees, Bryan Bernard, and Carole Scott, who were at the studio at the time of the call in question. Ms. Lewis stated that no one from KCNA called to obtain her permission prior to Mr. Kemp's call, and that she would not have given her permission in any event. Mr. Bernard, KCNA's former news director, denied that anyone from KCNA called to obtain Ms. Lewis' permission, and stated that Matt Roberts was not even in the KCNA building at the time of the call, as his shift did not begin until 10 p.m. Ms. Scott, KCNA's morning show producer at the time of the incident, also denied that Matt Roberts placed a call to Ms. Lewis, as such a call required her clearance. She further stated that after the incident took place, Mr. Kemp and other KCNA staff laughed that they had "put one over" on KBOY. All three individuals volunteered to testify under oath.

On February 1, 1990, you elaborated on your response to our inquiry by referencing the Matt Roberts affidavit, and contending that despite Ms. Lewis' claim that she did not know she was being broadcast, her continued "candid lively exchange" with Mr. Kemp indicated a knowing and willing participation in the broadcast.

Prior to determining whether to designate KCNA for a hearing on misrepresentation issues, we sent you another inquiry regarding Matt Roberts' presence at KCNA on the morning of July 27, 1989.[1] On September 19, 1990, you responded that Matt Roberts admitted having misrepresented the facts to the Commission. Specifically, Roberts admitted that Guy Kemp had not notified Ms. Lewis of the intent to broadcast the conversation. You state that Roberts signed the affidavit under Guy Kemp's alleged threat of terminating Roberts' employment. Upon learning of this incident, you state that you terminated Kemp's employment with KCNA, and took disciplinary action against Roberts. According to your response, you were not present in the control room on the morning of July 27, 1989, and therefore had to rely upon your employees' candor.[2] You submitted two supplemental pleadings, attempting to persuade us that KCNA should not be held accountable for Roberts' misrepresentation, because you were not aware of it, and that at most, KCNA should receive an admonition for its acknowledged Section 73.1206 violation.

Section 73.1206 of the Commission's Rules states:

> Before recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party origi-

[1] We also inquired about a complaint from Sue Dunn that upon calling KCNA's business office on November 29, 1989, she realized she was on the air without having been given prior notification of KCNA's intent to broadcast the conversation. You stated that you spoke to Sue Dunn when she called on the business office telephone line. You denied broadcasting the conversation, and pointed out that the separate telephone systems for the business line and the call-in line are incompatible, and calls cannot be transferred back and forth between systems. In view of the directly contradictory statements of KCNA and Ms. Dunn, we cannot sustain our burden with respect to an enforcement action. Thus, we will take no further action on this matter.

[2] The Commission conducted an informal investigation, which included interviews of relevant persons, to determine if KCNA made material misrepresentations concerning the July 27, 1989, incident. We concluded that there was insufficient evidence indicating that the licensee knowingly and willfully misrepresented to the Commission.

nates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

The Commission has issued forfeitures in a number of recent instances, even where the licensee acknowledged, upon Commission inquiry, a Section 73.1206 violation. *See e.g., Notice of Apparent Liability to Cook Inlet Radio (KSLX(FM), Scottsdale, Arizona),* (MMB), dated October 15, 1991; *Notice of Apparent Liability to Montachusett Broadcasting (WXLO-FM, Fitchburg, Massachusetts),* (MMB), dated October 15, 1991, *(response pending); Notice of Apparent Liability to The Hearst Corporation (WISN(AM), Milwaukee,)* (MMB), dated November 6, 1990; *Notice of Apparent Liability to EZ Communications, Inc. (KYKY-FM, St. Louis, Missouri),* (MMB), dated May 14, 1990; *Notice of Apparent Liability to Jacor Communications, (WEBN(FM), Cincinnati, Ohio),* (MMB), dated April 30, 1990; *Notice of Apparent Liability to Gannett Texas Broadcasting, Inc. (Radio Station KKBQ-FM, Pasadena, Texas),* (MMB), dated April 30, 1990. In this instance, KCNA's acknowledged violation is aggravated by the misrepresentation and subsequent recantation of one of its employees, which recantation did not take place until after further Commission inquiry. While we will not attribute the misrepresentation to KCNA's principals (see note 2, *supra),* an employer remains responsible for the actions of its employees. *Empire Broadcasting Corp.,* 25 FCC 2d 68 (1970).

In addition to the misrepresentation, KCNA's actions in this case do not augur in favor of an admonition. We note that it took two warning letters, dated October 23, 1989, and November 30, 1989, to elicit your response, which was required under Section 73.1015 of the Commission's Rules. Further, your most recent reply included only non-notarized statements from yourself and Matt Roberts, although we had requested notarized affidavits. Therefore, we will issue a forfeiture to KCNA for $2,000, the full amount that was allowed by law at the time this violation took place in 1989.[3]

In view of the circumstances outlined above, it appears that on July 27, 1989, station KCNA violated Section 73.1206 of the Commission's Rules. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Sound Broadcasting Corporation, licensee of station KCNA(AM), Cave Junction, Oregon, is hereby advised of its apparent liability for a forfeiture in the amount of two thousand dollars ($2,000) for its apparent willful violation of Section 73.1206 on the date set forth above. The amount was determined by using the criteria set forth in 503(b)(2) of the Communications Act.

Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] On December 19, 1989, the Omnibus Budget Reconciliation Act of 1989, Public Law 101-239,103 Stat 2131, became effective, which raised the forfeiture amounts for broadcast violations. Because KCNA's violation took place before the effective date, we are limited to the former amounts in Section 503(b)(2) of the Communications Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ESTRELLA LICENSE CORPORATION — File No. I-T-C-92-079

Application for Authority Under Section 214 of the Communications Act of 1934, as Amended, for Authorization to Acquire and Operate Satellite Capacity for the Provision of Video Channels from the United States to Mexico and from the United States to Latin American Locations

ORDER AND AUTHORIZATION

Adopted: May 20, 1992; Released: June 1, 1992

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned uncontested application seeking authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Morelos I and II satellites, for the provision of transborder video service from the United States to Mexico, and in PAS-1, for the provision of video broadcast services from the United States to points in Latin America. We find that a grant of the application will serve the public interest.

2. Estrella License Corporation (Estrella) is a wholly-owned subsidiary of Telemundo Group, Inc., which owns and operates a network providing Hispanic television service to viewers throughout the United States. By the present application Estrella requests authority to use its transportable earth station[1] to transmit video entertainment and informational programming to Mexico and Latin American points via the Morelos and PAS-1 satellites. Upon grant of the application, Estrella states, it will become a common carrier subject to Section 214 of the Communications Act of 1934, as amended.

3. Upon consideration of the instant application, we find that the public convenience and necessity would be served by Estrella's provision of video programming services via PAS-1 from the United States to those countries in Latin America which PAS-1 is authorized to serve.

4. With respect to Estrella's requested provision of transborder services over Morelos I and II, Estrella proposes service identical to service previously authorized under the Commission's transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement for the satellites it intends to utilize.[2] We have previously recognized that where an application involves the extension of existing or planned domestic networks to provide video services between the United States and Mexico using U.S. domestic satellites, as well as Morelos, a grant of transborder authority is consistent with the Commission's Transborder policy.[3] In such cases we have determined that use of the INTELSAT system would be both clearly impractical and uneconomical.[4] In addition, we find here that Estrella's request is in accord with current INTELSAT Article XIV(d) consultations[5] and therefore will cause neither technical interference nor significant economic harm to the global system.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-079 IS GRANTED, and Estrella is authorized to:

a. establish and operate on a common carrier basis a single channel of communication between its Earth Station (Call Sign *E890110)* and the Morelos I and Morelos II satellites, for the provision of video programming (with associated audio) to points in Mexico; and

b. establish and operate on a common carrier basis a single channel of communication between its earth station (Call Sign *E890110)* and the PAS-1 satellite, for the provision of video programming (with associated audio) to those points in Latin America which PAS-1 is authorized to serve.

6. IT IS FURTHER ORDERED that the authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Estrella and its correspondent(s) in Mexico or Latin America, respectively, and Estrella shall file copies of the agreement with the Commission within 30 days of its execution.

9. This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

10. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not dispense with any requirements that may be imposed by other countries involved.

11. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained or where the U.S. Government has determined that appropriate copyright protection does not otherwise exist.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Call Sign *E890110*. The earth station was modified on January 24, 1992, pursuant to Title III of the Communications Act of 1934, as amended, to add as points of communication the Morelos satellite system, for international transborder service, and PAS-1, for international analog television with associated audio service. *See* File No. CSG-91-157-ML.

[2] We note that Estrella clarified its application on March 12, 1992, to state that it is seeking authority "to offer transborder services over the Morelos and PAS satellite systems to those countries in Latin America for which the Commission has specifically authorized each system to serve." *See* Letter from William S. Reyner, Jr., Attorney for Estrella License Corporation, to George S. Li, Chief, International Facilities Division, submitted March 12, 1992. We have only authorized the use of the Morelos satellites for transborder service between the United States and Mexico. *See* Attachments 1 and 2 to Midwest Cable and Satellite, Inc., 7 FCC Rcd 151 (1992) (*Midwest*). However, since the applicant has indicated that its service will be one-way, from the United States to Mexico, we will limit this grant of authority accordingly.

[3] *See* Transborder Satellite Video Services, 88 FCC 2d 258, 280 (1981) (Duplication of services over INTELSAT would involve terrestrial links or multi-hop satellite connections, increase costs and result in an inefficient use of the available radio spectrum); RCA American Communications, Inc., *et al.*, File Nos. I-T-C-86-002, *et* al., Mimeo No. 2578, released February 14, 1986 (application of Upsouth Corp.).

[4] *Id.*

[5] *See Midwest, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

Willie A. Jefferson d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for
New FM Station, Channel 275C2,
Shreveport, Louisiana

Appearances

Stephen C. Simpson, on behalf of Opportunity Broadcasting of Shreveport; *Gene A. Bechtel*, on behalf of NTW, Inc.; *David Honig*, on behalf of Port City Communications L.P.; and *James J. Freeman*, on behalf of Caddo Broadcasting Limited Partnership.

DECISION

Adopted: May 20, 1992; Released: June 1, 1992

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL concurring in result.

Board Chairman MARINO:

1. In an *Initial Decision* (I.D.), 5 FCC Rcd 2601 (1990), Administrative Law Judge Edward Luton (ALJ) granted the application of Innovative Women's Media Association under the standard comparative issue. After exceptions were filed, the Review Board determined that the record raised substantial and material questions regarding Innovative's basic qualifications and therefore remanded for further hearing. *Opportunity Broadcasting of Shreveport*, 6 FCC Rcd 1699 (Rev. Bd. 1991). Thereafter, by *Order*, FCC 91M-1859, released June 11, 1991, the ALJ dismissed Innovative's application for failure to prosecute, thus mooting the remanded issues. In a one-page *Supplemental Initial Decision* (S.I.D.), 6 FCC Rcd 6826 (1991), the ALJ ranked the remaining four comparative applicants in the following order: 1) NTW, Inc.; 2) Caddo Broadcasting Limited Partnership; 3) Port City Communications, L.P.; and 4) Opportunity Broadcasting of Shreveport. Each of these applicants had been awarded 100% quantitative integration credit in the I.D., so that the only decisional differences between them were their qualitative enhancements. Specifically, the ALJ favored NTW because he found that its principals' long-term local residence and extensive local civic participation, combined with their superior record of broadcast experience, outweighed Caddo's preferences for minority and female participation. S.I.D., para. 4.

2. The losing applicants below have all excepted to the S.I.D., and we have reviewed these pleadings (referenced below as Supp. Br. at) as well as the original exceptions to the I.D. and the underlying hearing record. Having heard oral argument on the original exceptions, further argument is not needed. We conclude that the ALJ's integration conclusions should be affirmed and NTW awarded the construction permit. This conclusion is premised principally on an evaluation of the applicants' relative qualitative enhancements. In this regard, we have not weighed in the balance female enhancement, even though the S.I.D. considered that factor. Subsequent to the issuance of the S.I.D., the Court held in *Jerome Thomas Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), that the Commission's policy of awarding enhanced comparative credit for female ownership and participation violates the Fifth Amendment, and remanded the proceeding for a determination of who should be awarded the construction permit in the absence of this unconstitutional policy. The Commission has now called for additional briefing in *Lamprecht*, and in *Swan Broadcasting Ltd.*, 6 FCC Rcd 17 (Rev. Bd. 1991) (appeal pending), another proceeding in which the Board granted an application on the basis of a female preference. FCC 92I-23, released April 13, 1992, and FCC 92I-22, released April 10, 1992. Although two of the parties before us have requested permission to brief the impact of the *Lamprecht* decision, we decline their invitation for yet a further round of pleadings because we find, for the reasons stated below, that this factor has no decisional impact in this case.

3. The ALJ's conclusion that NTW is the qualitatively superior applicant is challenged by both Port City and Caddo. Opportunity, on the other hand, does not except to the ALJ's enhancement evaluation but argues that it is the only applicant entitled to 100% quantitative integration credit and that analysis of the qualitative enhancement factors is thus irrelevant. Supp. Br. at 4. Because of Opportunity's implicit concession (with which we agree) that it cannot win the case on the basis of its qualitative enhancements, and our holding that NTW is entitled to full integration credit, we need not address Opportunity's exceptions further. *See* 47 CFR § 1.276(a) (Any objection not saved by exception is waived); 47 CFR § 1.282(b) (Exceptions which are not of decisional significance will be denied without a specific statement of reasons).

QUALITATIVE COMPARISON

4. *NTW* is a corporation with three stockholders: Dolores G. La Vigne, who owns 51% of the shares, Don L. Owen, who holds 29% of the stock, and Pete Harris, who owns 20% of the equity. I.D., para. 8. Each of them has extensive or life-long local residence. Thus, Mr. Owen, who is 59 years old, has resided in Shreveport for the past 35 years; Ms. La Vigne, who is 54 years old, has lived in Shreveport virtually her entire life; and Mr. Harris, who is 72 years old, has resided in Shreveport for the past 52

years. I.D., para. 18. Ms. La Vigne, the 51% owner, has an extensive history of civic activities dating back to 1956. These include continuous, long-term association with organizations such as the Chamber of Commerce, the YMCA, the Junior League, and her church. She has served on the board of directors of such organizations as Rutherford House, Inc., (rehabilitation of teen-age drug abusers), the Louisiana State University Associates, the American Red Cross, the Louisiana Association of Business and Industry, and has chaired the Juvenile Court Tax Renewal Committee and the Community Gifts for Allendale YMCA Building Fund, and been a member of the Greater Shreveport Downtown Development Foundation, the Greater Shreveport Economic Development Corporation, and the Metropolitan Planning Commission. I.D., paras. 21-22. Mr. Owen has been active in a few civic organizations in Shreveport including serving on the board of directors of the Louisiana State Fair. I.D., para. 23. Mr. Harris has been active in a fair number of civic organizations, which include the following: President of the Shreveport Landmark, since 1983, an organization engaged in upgrading rundown housing; Member of the Board of Directors of the United Way, Shreveport, since 1979, including serving on two committees; the Shreveport Rotary Club; the Shreveport Airport Authority; Charter Member of the American Legion Post; and his church. I.D., para. 24.

5. In terms of broadcast experience, Mr. Owen has extensive management experience. From 1954 to 1984, he was Vice President and News Director at KSLA-TV, Shreveport, where his duties included supervising the news department, setting news policy, directing the station's long-term planning, and anchoring the nightly newscast. For six years before that, he was employed at various on-air positions at several other stations. I.D., para. 20; NTW Exh. 2. Ms. La Vigne was the principal owner (49%) and Chairman of the Board of KSLA-TV, Inc., the former licensee of KSLA-TV, from 1978 to 1982, where she set overall station policy and represented the station in affiliates' meetings and other functions. I.D., para. 19; NTW Exh. 1. In terms of minority participation, Mr. Harris is a black male. I.D., para. 18; NTW Exh. 3.

6. *Port City* is a limited partnership whose sole general partner, and 25% equity owner, is Larry English, who proposes to serve as full-time general manager. I.D., paras. 26, 28. English has resided in Shreveport his entire life, except from 1973 to 1976, when he was in the army. I.D., para. 29. (Port City's exhibits do not provide English's age or date of birth.) Almost all of English's claimed civic activities post-date the filing of Port City's application, except for his membership since 1986 in the NAACP, Shreveport Branch, of which he served as president for two years, and his church membership since 1980. I.D., para. 31. In terms of broadcast experience, English has participated on the Advisory Board of Shreveport public radio station KDAQ-FM since 1988, and has worked as host and producer of a weekly community affairs program for the local access channel of Cablevision of Shreveport since 1988. I.D., para. 30. English is a black male. I.D., para. 28.

7. NTW is clearly superior to Port City under the unified factor of local residence and civic participation. First, all of NTW's principals have decades of lifelong or continuous Shreveport residence whereas Port City's English, who is also a lifetime resident, was absent for three years during his army service, and, judging from the dates of that service, is evidently much younger than his counterparts and thus has spent considerably fewer adult years in the community than they have. *See Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991). Nevertheless, even if this factor were deemed only marginally in NTW's favor because all of these individuals have substantial local residence, *see, e.g., Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991), NTW would still receive a significant preference for local familiarity because of its principals' civic enhancements. Port City's English can point to only a single pre-application filing organization in which he became active (and only approximately one year prior to filing). By stark contrast, NTW's majority owner, La Vigne, has a varied and extensive history of heavy civic involvement going back many years, and its other principals have also been civically active in various organizations. *See Rebecca L. Boedker*, 6 FCC Rcd 2557, 2558 (1991); *Ronald Sorenson*, 6 FCC Rcd 1952, 1953 (1991). NTW also enjoys a substantial advantage over Port City for broadcast experience based on the impressive management and ownership records of Owen and La Vigne (comprising 80% of NTW's ownership), compared to the minimal post-application filing activities of English. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 790 (Rev. Bd. 1986). Just as the Commission only awards reduced credit to post-filing residence and civic activities, it follows that post-filing broadcast experience is also entitled to less weight. *Cf. Kennelwood Broadcasting Co., Inc.*, 7 FCC Rcd 520 (1992) and cases cited therein at para. 4. Against NTW's two solid preferences, Port City receives a single preference for English's minority status which, because he is a 100% owner, is superior to the credit awarded NTW for Harris, who is a 20% minority owner. We agree with the ALJ that NTW's combined preferences easily prevail over Port City's single preference. *See Great Lakes Broadcasting, Inc.*, 7 FCC Rcd 1829, 1831 (Rev. Bd. 1992).

8. *Caddo* is a limited partnership with the following ownership structure:

Name	Position	Equity
Green Broadcasting, Inc. (GBI)	General Partner	22.22%
Paul C. Cox	Limited Partner	11.12%
Caddo Broadcasting Systems, Inc. (CBS)	Limited Partner	66.66%

I.D., para. 151; Caddo Exh. 1, at 1. In turn, 90% of GBI's stock is held by its president, Claudette Green, who thus has a 20% equity interest in Caddo. The other 10% of GBI's stock is owned by Paul C. Cox who, combined with his limited partnership interest, thus owns 13.34% of Caddo. CBS is owned equally by Michael Vizard and Edward Gaiennie, who thus each own 33.33% of Caddo. I.D., para. 152.

9. Claudette Green, who proposes to be Caddo's general manager, was born in Shreveport in 1957 and has lived there all her life, except for a period of 4-1/2 years, when she went to college in Baton Rouge and worked in Birmingham, Alabama. I.D., paras. 153, 170. Paul A. Cox, who will act as Caddo's business manager, has been a Shreveport resident since 1984. I.D., para. 154. Green's civic activities date largely from 1985, and include service on the Shreveport Women's Commission, the board of the

Youth Enrichment Program, the Parking Ordinance Hearing Board, and the Downtown Development Authority Hotel Task Force. Other activities post-date the filing of Caddo's application. I.D., para. 171. Cox has had a few civic activities since 1985, such as membership on the board of the Meadows Museum, the Louisiana Task Force for Higher Education, and the Pit Krewe, an organization promoting the arts. I.D., para. 174. In terms of broadcast experience, Green worked approximately four years as a traffic manager, and five years as an account executive. I.D., para. 172. Green is a black female. I.D., para. 153.

10. Before comparing Caddo's application to NTW's, we must make an adjustment to the ALJ's evaluation based on the Commission's holding in *Cotton Broadcasting Co.*, 4 FCC Rcd 1781 (1989). There, the Commission held that the ownership interests of a person who is both a general and a limited partner will be attributed to the applicant because it is not possible to separate the interests. "This ruling . . . increase[s] the relative weight accorded to the person holding both general and limited partnership interests for integration purposes, by increasing the interests scrutinized in the comparative process to include attributable limited partnership interests." *Id.* at 1782; *accord*, *Ronald Sorenson*, 6 FCC Rcd at 1954, n. 1 (extending *Cotton* to two-tiered corporate structures). Applying *Cotton* here to Cox's combined active interest of 13.34% and Green's active interest of 20%, which totals an aggregate equity of 33.34%, alters the weight assigned their relative attributable interests to 40% for Cox's share (13.34/33.34) and 60% for Green's share (20/33.34).

11. Although Caddo does not dispute the above calculus (Supp. Reply Br. at 7), and whereas we agree with Caddo that its quantitative credit should not be reduced below 100% because both Cox and Green propose to be fully integrated, the impact of *Cotton* does change the respective enhancement credits, as will be seen below. While Caddo argues that *Cotton* should not be applied here because it is inconsistent with the Commission's pre-*Cotton* reliance on voting control to determine integration credit (Supp. Br. at 5, n.2), we, of course, are not free to alter or re-examine the Commission's analysis in *Cotton* (which reversed the Board's holding) or its progeny, *Sorenson*. Moreover, application of pre-*Cotton* standards would not assist Caddo because the Board's previous practice was to deny all credit to principals who were listed as both general and limited partners. *See Religious Broadcasting Network*, 3 FCC Rcd 4085, 4091-92 (Rev. Bd. 1988); *Cotton Broadcasting Co.*, 104 FCC 2d 473, 475-77 (Rev. Bd. 1986).

12. In terms of local residence, NTW's proposal, which is enhanced by the life-long and/or decades-long residence of all of its principals, is superior to Caddo's, which offers the lifetime residence of only Green (entitled to 60% credit), and the far briefer residence, since 1984, of Cox (entitled to 40% credit). Green's credit is also diminished somewhat because her residence was interrupted by a 4-1/2 year absence and includes far fewer adult years in the community than NTW's principals have. *See Frank Digesu, Sr.*, 7 FCC Rcd 837, 841 (Rev. Bd. 1992); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984). NTW's advantage in this regard is significantly increased by the civic activities of its principals, particularly those of its 51% owner, La Vigne, who has a long history of community involvement over several decades, including leadership positions in numerous organizations. By contrast, Caddo's 60% principal, Green, has activities which are far fewer and mostly date from 1985, just two years prior to filing the application. Cox, its 40% principal, also has activities only dating from 1985, and these do not outweigh the combined civic records of NTW's other principals, Owen and Harris, who comprise 49% of its ownership. In sum, in terms of local familiarity, which both local residence and civic activities backgrounds are meant to foster, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), NTW earns a substantial preference over Caddo. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 (1991); *Talleyrand Broadcasting*, 103 FCC 2d 476, 480 (1985). NTW also receives a clear preference because of the significant management and ownership broadcast experience of 80% of its ownership, as contrasted with the far less significant experience of Caddo's 60% owner. *See Barton Broadcasting Co., supra.* Although Caddo has an advantage for minority ownership and participation (60% vs. 20%), this difference is less than that credited by the ALJ and, in any event, does not outweigh the combined preferences awarded NTW. *See Great Lakes Broadcasting, Inc., supra* ; *Frank Digesu, Sr., supra.* Finally, even if we were permitted to consider gender differences, NTW's 51% credit (for La Vigne) and Caddo's 60% credit (for Green) would not produce any decisional difference. NTW is the superior comparative applicant.

OTHER MATTERS

13. The only remaining objection to NTW's selection is the claim that NTW cannot receive more than 80% full-time integration because the proposal of its 20% owner, Pete Harris, cannot be credited. *See* para. 3, *supra*. Harris was awarded full credit by the ALJ for his proposal to work full time as NTW's director of public affairs and community relations. I.D., para. 16. Opportunity and Port City claim that Harris is insufficiently familiar with his proposed role, that his role is non-managerial in nature, and that he will continue to own a restaurant business. Opportunity further maintains that NTW's other principals, La Vigne and Owen, also have conflicting business interests. (Opportunity Supp. Br. at 6-10; Port City Supp. Br. at 5-12). We reject these exceptions.

14. No substantial challenge to the ability of La Vigne or Owen to effectuate their proposals has been made. Opportunity's arguments that La Vigne travels frequently, has other business interests, and has never held a full-time salaried position (Supp. Br. at 7) do not undermine her proposal. La Vigne made a specific commitment to curtail her other business activities which, as the ALJ found, are largely passive investment interests, and to which she devotes at present only six to eight hours a week. NTW Exh. 1. Even if she continued this present schedule, it would not interfere with her ability to commit 40 hours to the proposed station. *See Kennelwood Broadcasting Co., Inc.*, 6 FCC Rcd 1350, 1352 (Rev. Bd. 1991) (and cases cited therein), *recon. denied*, 6 FCC Rcd 2894, *rev. denied*, 7 FCC Rcd 520 (1992). Moreover, La Vigne employs a business manager who is capable of overseeing her business interests without direct supervision. NTW Exh. 1.

15. As to Owen, Opportunity points out that he is currently serving on the Louisiana Public Service Commission for the Fifth District, that he spends 10 hours per week in this position and 10 hours per month travelling in the district, and will seek re-election and maintain his position if NTW prevails. (Supp. Br. at 7-8). Here, again, the ALJ's findings clearly establish that Owen can readily

accommodate his other interests and fulfill his full-time commitment to the station. Specifically he will devote a *maximum* of 10 hours per week to his Commission duties, in addition to his 10 hours per month travel time, and two days per month for Commission meetings in Baton Rouge and Monroe, Louisiana. I.D., para. 15; tr. 86, 174, 129-133, 180-182. The total time commitment is well within the 50-60 hour weekly proposals routinely credited. *See Achernar Broadcasting Co.*, 5 FCC Rcd 6309, 6312 (Rev. Bd. 1990), *rev'd on other grounds*, 6 FCC Rcd 5393 (1991); *Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982).

16. We also find that the record provides reasonable assurance that Pete Harris will effectuate his proposal to serve as NTW's full-time Director of Public Affairs and Community Relations. First, we reject the contention that this is not a management position. In fact, positions of this nature with the identical or comparable titles have been routinely credited as management-level. *See, e.g., National Communications Industries*, 7 FCC Rcd 1703, 1705 n. 3 (1992); *Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4244-4245 (Rev. Bd. 1991), *modified on other grounds*, 7 FCC Rcd 1430 (1992). The more significant question is whether the position described entails sufficient policy-making or managerial functions to qualify for credit. We believe it does. In his assigned role, Harris proposes to direct and implement the station's public affairs programming, and serve as station liaison with the community, thereby engaging in the development and implementation of programming responsive to community needs. NTW Exh. 3, p. 2. He stated that he would act as a news reporter by going out and gathering information on what was happening in the community, and bringing it to the station's newswriters to be put on the air. Tr. 342-343. In this respect, he would rely on his background experience such as his association with the Shreveport Airport Authority and as president of a low rent housing committee organization to elicit and address important community issues. *Id.* He will discuss policy matters with La Vigne, tr. 391, and will be involved in interview programs, writing editorials, hosting shows, and resolving listener complaints. Tr. 161-163. While he has no direct broadcast experience and does not yet know the full scope of his involvement with the station, tr. 318, he has been told by Mr. Owen, who is an experienced broadcaster, what his responsibilities will be, and he will rely on Owen to train him in his duties. Tr. 329-330.

17. Although exceptors argue that Harris was brought in to the application as an afterthought merely to garner a minority preference, the record shows that Harris was not a stranger to the other principals, but that through their past political and civic activities, both Owen and La Vigne "know [Harris] quite well and for a long period of time and think very highly of him." Tr. 95. In addition, Owen has paid for his stock himself out of his personal funds, tr. 317; and is sharing 20% of the costs. Tr. 97-98. And, since joining NTW, Harris has been an active participant, attending five of the six meetings that were held. Tr. 140-142. Moreover, his ownership interest is not so large as to suggest it was designed to automatically achieve a minority preference in the typical multi-party comparative case (such as this one where his interest is, in fact, less than that of the minority participants in each of the other applicants). In sum, Harris's equity share seems proportionately catered to the level of responsibility he will hold in a small station where the three principals will be working closely together as "partners" in running the operation. Tr. 161, 391-393. Harris and the other NTW principals are entitled to integration credit because NTW has set forth a specific integration proposal, adhered to it, and provided reasonable assurance that its plan will be carried out. *Coast TV*, 5 FCC Rcd 2751, 2752 (1990); *Pacific Television, Ltd.*, 3 FCC Rcd 1700 (1987); *Bradley, Hand & Triplett*, 89 FCC 2d at 662.

18. Finally, as to Harris's restaurant business, NTW has satisfied the traditional Commission requirement of showing how he can accommodate his commitment to the station in light of his other business interest. *See Blancett Broadcasting Co.*, 17 FCC 2d 227, 230 (Rev. Bd. 1969). Specifically, he will curtail his involvement as principal owner and manager of the Freeman and Harris Cafe in Shreveport by terminating his posiiton as General Manager and withdrawing from day-to-day management of the restaurant. NTW Exh. 3, p. 2. The day-to-day operations will be taken over and divided among the restaurant's three managers, who are Harris's children. Tr. 351-352. Thus, no serious question as to the reliability of Harris's proposal remains. *See Joe L. Aldridge*, 6 FCC Rcd 994 (Rev. Bd. 1991); *Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3797 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 792 (Rev. Bd. 1986).

19. In sum, we affirm the ALJ's conclusion, S.I.D., para. 4, that a grant of NTW's application will best serve the public interest, convenience, and necessity.

20. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed March 23, 1992, by Port City Communications, L.P., IS GRANTED, and the amendment IS ACCEPTED; that the suggestion to invite supplemental exceptions, filed March 6, 1992, by Port City Communications, LP, and the motion to strike filed December 17,1991, by Caddo Limited Partnership ARE DENIED; and

21. IT IS FURTHER ORDERED, That the application for NTW, Inc. (File No. BPH-870820ME) for a construction permit for a new FM station in Shreveport, Louisiana IS GRANTED, and the applications of Willie A. Jefferson d/b/a Opportunity Broadcasting of Shreveport (File No. BPH-870814MK), Port City Communications, L.P. (File No. BPH-870820MH), and Caddo Broadcasting Limited Partnership (File No. BPH-870820MR) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-117

In the Matter of

Amendment to Section 1.773 of the
Commission's Rules Regarding
Pleading Cycle for Petitions
Against Tariff Filings Made on
14 Days' Notice

NOTICE OF PROPOSED RULEMAKING

Adopted: May 14, 1992; Released: June 1, 1992

Comment Date: July 23, 1992
Reply Comment Date: August 7, 1992

By the Commission:

I. INTRODUCTION

1. By this Notice, the Commission proposes to adjust the pleading cycle for petitions seeking investigation, suspension, or rejection of tariff filings made on 14 days' notice. In order to allow the Commission time to evaluate fully arguments against the lawfulness of these tariffs, we tentatively conclude that it is necessary to amend Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, to require that petitions be filed within six calendar days after the date of 14-day tariff filings and that subsequent replies be filed within three calendar days after service of the petition. Because of this short pleading cycle, we also tentatively conclude that all pleadings must be personally served on the parties involved in the tariff proceeding.

II. BACKGROUND

2. In several recent proceedings, the Commission has adopted streamlined review for a number of different types of tariff filings. For example, under price cap regulation, AT&T Communications (AT&T) and certain local exchange carriers (LECs) may file below-cap, within-band tariffs on 14 days' notice.[1] These tariffs are presumed lawful if the rate changes comply with Commission-mandated rate band limitations that produce an Actual Price Index (API) for the relevant basket no greater than the applicable Price Cap Index (PCI). In addition, the Commission recently amended the rules to exclude AT&T's business services from price cap regulation and to streamline tariff review of these services.[2] Pursuant to this Order, AT&T may file tariffs on 14 days' notice for most of its business services. Finally, non-dominant carriers are also allowed to file tariffs on 14 days' notice.[3] In allowing streamlined review of these various tariffs, the Commission has emphasized that such review is not equivalent to automatic acceptance of a rate or other tariff change; petitioners still have the opportunity to petition tariff filings and address issues such as discrimination.[4]

III. DISCUSSION

3. Pursuant to Section 1.773(a)(2)(i) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2)(i), petitions against a new tariff filed on less than 30 days' notice must be filed and served within seven calendar days of the tariff filing. Under Section 1.773(b)(1)(i), 47 C.F.R. § 1.773(b)(1)(i), replies must be filed and served within four days after service of the petition. Intermediate holidays[5] are counted during the seven-day period.[6] Holidays are not counted during the four-day reply period, however, and a carrier served with a petition by mail has an additional three days to file its reply.[7] Under our current rules, therefore, the pleading cycle for a 14-day tariff may end after the effective date of the tariff if a petition is served by mail. This affords the Commission no time to consider the arguments against a 14-day tariff filing within that notice period.

4. The Commission believes it is in the public interest to revise the pleading deadlines for 14-day tariffs by shortening the petition and reply periods by one day each and by counting intermediate holidays (as defined in Section 1.4(e)(1) of the Rules) in calculating both filing periods. We therefore propose to amend Section 1.773 of the Rules to require that petitions be filed no later than six calendar days after the date of the tariff filing and that replies be filed no later than three calendar days after service of the petition. This shortened pleading cycle will give the Commission four days to consider the pleadings received after the pleading cycle closes. Under this proposal, the Commission's rule regarding pleadings filed on a holiday is unchanged; should the date for filing the petition or reply fall on a holiday, the pleading would be due on the first succeeding business day.[8] Similarly, plead-

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[1] 47 C.F.R. § 61.58(c)(2). *See also* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6822 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order)* (adopting 14-day filing rule for LECs), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC,* No. 91-1279 (D.C. Cir. June 14, 1991); Report and Order and Second Further Notice, 4 FCC Rcd 2873, 3095-3100 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (*AT&T Price Cap Order)* (adopting 14-day filing rule for AT&T), *modified on recon.* 6 FCC Rcd 665 (1991), *appeal docketed, AT&T v. FCC,* No. 91-1178 (D.C. Cir. April 15, 1991).

[2] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991) (*Interexchange Order), reconsidered in part,* Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration,* 7 FCC Rcd 2677 (1992). AT&T's services offered to residential customers, its 800 services and analog private line services remain subject to price cap regulation.

[3] *See* 47 C.F.R. § 61.58(b).

[4] *See, e.g., LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2697.

[5] Section 1.4(e)(1) of the Commission's Rules, 47 C.F.R. §1.4(e)(1), defines holidays as Saturday, Sunday, federal legal holidays, or any other day on which the Commission's offices are closed and not reopened prior to 5:30 p.m.

[6] *See* 47 C.F.R. § 1.773(a)(3).

[7] *See* 47 C.F.R. § 1.773(b)(2).

[8] *See* 47 C.F.R. §§ 1.773(a)(2)(iii), 1.773 (b)(2).

ings responding to tariffs filed on more than 14 days' notice but less than 30 days' notice will continue to be filed pursuant to the current rules; petitions are due seven days after the tariff is filed, while replies are due four days after service of the petition.

5. Because of the short time periods involved in this revised pleading cycle, we also propose to eliminate the option to serve any party in a 14-day tariff proceeding by mail. Specifically, we would require petitions and replies to be filed with the Commission and served simultaneously upon the Chief, Common Carrier Bureau, and the Chief, Tariff Division. Each petition or reply would also be personally served on the carrier or on other parties involved. While we believe that personal service is the preferred means of delivery to other parties, we also seek comment on the advisability of allowing service by facsimile, followed by the mailing of a copy of the pleading, to parties other than the Commission.

IV. PROPOSED RULES

6. In summary, we propose to add the appropriate new subsections to Section 1.773 of the Commission's Rules to require that petitions seeking investigation, suspension, or rejection of a tariff filing made on 14 days' notice be filed within six calendar days after the date of the tariff filing; a carrier's reply to such a petition for relief from a tariff filing must be filed within three calendar days after service of the petition. We propose to count intermediate holidays (as defined by Section 1.4(e)(1) of the Rules) in calculating both the six-day and three-day periods.[9] Additionally, to allow interested parties as much time as possible in this short pleading cycle to advance their position, we tentatively conclude that petitions and replies should be personally served on all parties. However, we seek comment on whether to permit facsimile service of a petition or reply, followed by mailing a copy, as an alternative to personal service to parties other than the Commission.

7. Finally, Section 1.773 contains various designations for petitions against tariff filings, for example, labeling them as "petitions seeking suspension or rejection of a new tariff filing" or as "petitions seeking suspension and investigation, or rejection of a new or revised tariff filing." In order to maintain consistency throughout the rule, we believe we should modify the current text to uniformly designate petitions as "seeking investigation, suspension, or rejection of a new or revised tariff filing."

8. We seek comments on this proposal, and invite parties to submit alternative proposals.

V. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

9. **Reason for action.** The Commission is issuing this Notice of Proposed Rulemaking to seek comment regarding adjustment of the pleading cycle for petitions to investigate, suspend, or reject tariffs filed with the Commission on 14 days' notice.

10. **Objectives**. The objective of this Notice of Proposed Rulemaking is to provide the Commission additional time to review petitions against tariffs filed on 14 days' notice.

11. **Legal Basis**. Sections 1, 4(i), 4(j), 201-205, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 303(r).

12. **Description, potential impact, and number of small entities affected**. The proposed amendments to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, mandate that petitions to investigate, suspend, or reject a tariff filing made on 14 days' notice be filed within six calendar days after the date of the tariff filing. The carrier's reply to these petitions must be filed within three calendar days after the petition is served. Intermediate holidays are counted during both filing periods. The amendments also require the petition and reply to be personally served on all parties. Small entities should experience no significant economic impact from this minor rule adjustment.

13. **Reporting, recordkeeping, and other compliance requirements**. The proposed rules impose no reporting requirements and no new recordkeeping requirements.

14. **Federal rules which overlap, duplicate, or conflict with the Commission's proposal**. None.

15. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives**. None.

16. **Comments are solicited**. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on other issues in this Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as Responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, et seq.

VI. EX PARTE REQUIREMENTS

17. *Ex Parte Rules -Non-Restricted Proceeding*. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

VII. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

19. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **July 23, 1992.** Reply comments should be filed no later than **August 7, 1992.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file

[9] We also propose the appropriate corresponding change to Section 1.4(g) of the Commission's Rules, 47 C.F.R. § 1.4(g). *See* appendix.

two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED that the Secretary shall mail a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1--PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.4 is amended by revising paragraph (g) introductory text to read as follows:

§ 1.4 Computation of Time

* * * * *

(g) Unless otherwise provided (e.g. § 1.773 of the Rules), if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.

* * * * *

3. Section 1.773 is amended by revising paragraph (a)(1), the first sentence of paragraphs (a)(1)(i) and (a)(2); redesignating paragraphs (a)(2)(i) through (iii) as paragraphs (ii) through (iv) and revising them; then adding new paragraph (a)(2)(i); adding paragraph (a)(4); redesignating paragraphs (b)(1)(i) through (iv) as (ii) through (v) and revising them, except in paragragh (b)(1)(v) only the last sentence is revised; then adding new paragraph (b)(1)(i); and revising paragraphs (b)(2) and (c) to read as follows:

§ 1.773 Petitions for suspension or rejection of new tariff filings.

(a)*Petition-(1)Content.* Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing or any provision thereof shall specify its Federal Communications Commission tariff number and carrier transmittal number, the items against which protest is made, and the specific reasons why the protested tariff filing warrants investigation, suspension, or rejection under the Communications Act. No petition shall include a prayer that it also be considered a formal complaint. Any formal complaint shall be filed as a separate pleading as provided in § 1.721.

(i) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing or any provision of such a publication, must specify the pertinent Federal Communications Commission tariff number and carrier transmittal number; the matters protested; and the specific reasons why the tariff warrants investigation, suspension, or rejection. * * *

* * * * *

(2)*When filed.* All petitions seeking investigation, suspension, or rejection of a new or revised tariff filing shall meet the filing requirements of this paragraph. * * *

(i) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be filed and served within 6 days after the date of the tariff filing.

(ii) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 15 but less than 30 days notice shall be filed and served within 7 days after the date of the tariff filing.

(iii) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 30 but less than 90 days notice shall be filed and served within 15 days after the date of the tariff filing.

(iv) Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 90 or more days notice shall be filed and served within 25 days after the date of the tariff filing.

* * * * *

(4) *Copies, Service.* An original and 4 copies of each petition shall be filed with the Commission and separate copies served simultaneously upon the Chief, Common Carrier Bureau, and the Chief, Tariff Division. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be personally served on the filing carrier. Petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 15 or more days notice may be served on the filing carrier by mail.

(b)(1) * * *

(i) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice shall be filed and served within 3 days after service of the petition.

(ii) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 15 but less than 30 days notice shall be filed and served within 4 days after service of the petition.

(iii) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on at least 30 but less than 90 days notice shall be filed and served within 5 days after service of the petition.

(iv) Replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 90 or more days notice shall be filed and served within 8 days after service of the petition.

(v) * * * The time for filing such a consolidated reply will begin to run on the last date for timely filed petitions, as fixed by (a)(2)(i)-(iv) of this section, and the date on which the consolidated reply is due will be governed by (b)(1)(i)-(iv) of this section.

(2) *Computation of time.* Intermediate holidays shall be counted in determining the 3-day filing date for replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on less than 15 days notice. Intermediate holidays shall not be counted in determining filing dates for replies to petitions seeking investigation, suspension, or rejection of a new or revised tariff filing made on 15 or more days notice. When a petition is permitted to be served upon the filing carrier by mail, an additional 3 days (counting holidays) may be allowed for filing the reply. If the date for filing the reply falls on a holiday, the reply may be filed on the next succeeding business day.

(c) *Copies, Service.* An original and 4 copies of each reply shall be filed with the Commission and separate copies served simultaneously upon the Chief, Common Carrier Bureau, and the Chief, Tariff Division. Replies responding to a new or revised tariff filing made on less than 15 days notice shall be personally served on the petitioner. Replies responding to a new or revised tariff filing made on 15 or more days notice may be served on petitioner by mail.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1992

PETITION FOR CLARIFICATION AND MODIFICATION OF PAY-PER-CALL RULES FILED BY NATIONAL ASSOCIATION OF ATTORNEYS GENERAL TO BE TREATED AS A PETITION FOR RULE MAKING, RM-7990

Comment Date: July 8, 1992
Reply Comments Due: July 28, 1992

The 900 Number Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General (NAAG) and thirty-four states filed a Petition for Clarification and Modification of the Commission's pay-per-call rules on April 30, 1992. The Petition was filed in CC Docket 91-65, Policies and Rules Concerning Interstate 900 Telecommunications Services. The Petition requests that the Commission issue an order (1) clearly stating that the pay-per-call rules apply when such services are offered over standard inward WATS (800 Number) services and (2) prohibiting carriers from providing standard inward WATS service for services which bill customers through the use of either tone-generation technology, automatic number identification (ANI) or billing detail information.

The Petition will be treated as a petition for rule making rather than as a filing in CC Docket 91-65. Parties wishing to comment on this matter may do so no later than **July 8, 1992.** Replies may be filed no later than **July 28, 1992.** All filings concerning this matter should refer to RM-7990.

Copies of the Petition and any subsequently filed documents in this proceeding may be obtained from Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. The Petition and documents are also available for inspection and copying during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Thomas David at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-170

In re Applications of

TRACY A MOORE d/b/a GIFFORD ORION BROADCASTING, LTD.	File No. BPH-880308MK
JOHN E. MORRIS and LAWRENCE R. BAKER d/b/a MORBAK COMMUNICATIONS	File No. BPH-880309ME
AMERIWAVE, INC.	File No. BPH-880309MF
JIANT BROADCASTING, INC.	File No. BPH-880310ME
MOLLY BEARD BROADCASTING, LTD.	File No. BPH-880310MS

For Construction Permit for a
New FM Station on Channel 234A
in Gifford, Florida

Appearances

George R. Borsari, Jr. on behalf of Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd.; *William D. Silva, Esq.* on behalf of John E. Morris and Lawrence R. Baker d/b/a/ Morbak Communications; *George L. Lyon, Jr. Esq.* on behalf of Ameriwave, Inc.; *Lawrence M. Miller, Esq.* and *Steven C. Schaffer, Esq.* on behalf of Jiant Broadcasting, Inc.; *Timothy K. Brady, Esq.* on behalf of Molly Beard Broadcasting, Limited; and *James W. Shook, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: May 22, 1992; Released: June 2, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order* ("*HDO*"). (DA 90-436) 5 FCC Rcd 3008, released May 14, 1990, the above-referenced applications were designated for comparative hearing on the following issues:[1]

> If a final Environmental Impact Statement is issued with respect to Ameriwave in which it is concluded that the proposed facilities are likely to have no adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319;
>
> To determine whether there is a reasonable possibility that the tower heights and locations proposed by Morbak, Ameriwave and Jiant would constitute a hazard to air navigation;
>
> To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The air hazard issues specified against John E. Morris and Lawrence R. Baker d/b/a Morbak Communications ("Morbak"), Ameriwave, Inc. ("Ameriwave"), and Jiant Broadcasting Company, Inc ("Jiant") were resolved in favor of the applicants by the respective *Memorandum Opinion and Orders*: FCC 90M-3865, released December 7, 1990; FCC 90M-2207, released July 24, 1990 and FCC 90M-3941, released December 13, 1990.

3. The contingent environmental impact issue designated against Ameriwave was resolved in its favor by *Memorandum Opinion and Order*, FCC 90M-2050, released July 16, 1990.

4. A prehearing conference was held on July 24, 1990, and hearing sessions were held on January 7 and 8, 1991. The record was closed on January 8, 1991. *See Order*, FCC 91M-106, released January 11, 1991.

5. By *Memorandum Opinion and Order*, FCC 91M-761, released February 27, 1991, the Presiding Judge added financial and misrepresentation issues against Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd. ("Gifford Orion"). A hearing session was held on the added issues on July 31, 1991. During that hearing session, the Presiding Judge ruled on the record that the misrepresentation issue was resolved in favor of Gifford Orion. *See Order*, FCC 91M-2401, released August 5, 1991.

6. By *Memorandum Opinion and Order*, FCC 91M-1692, released May 23, 1991, the Presiding Judge added the following issues against Molly Beard Broadcasting, Ltd. ("Beard"):

> To determine whether Molly Beard Broadcasting, Ltd. is financially qualified to be a Commission licensee; and
>
> To determine whether Molly Beard Broadcasting, Ltd. falsely certified its application with respect to its financial qualifications and the effect there of on its qualifications to be a Commission licensee.

7. The financial qualification/misrepresentation issues specified against Beard were resolved in its favor by *Memorandum Opinion and Order*, FCC 91M-3478, released December 19, 1991.

Findings of Fact

Basic Qualification Issues

Financial Qualification Issue - Gifford Orion

8. Gifford Orion is a limited partnership organized March 7, 1988. Tracy Moore is the sole general partner and Orion Communications, Inc. ("OCI") the limited partner. OCI is comprised of two principals, Michael Kahn and Robert Merson, who each hold a 50% stock interest in the corporation (Gifford Orion Exh. 1, pp. 1, 2).

9. Prior to filing the Gifford Orion application on March 8, 1988, general partner Tracy Moore obtained estimates and developed written projections of construction and operating costs (Tr. 331, 332). At hearing Ms. Moore alleged that although she was not able to locate her 1988 work papers, she has, following the specification of the financial issues, recreated to the extent possible her written projections of the cost of construction and operation for three months without revenue, and believes that her original estimate of approximately $200,000 continues to be valid (Tr. 332; Gifford Orion Exh. 12, pp. 1, 2).

10. In developing her original written projections, Ms. Moore relied on a number of sources, including her attorneys; her engineer; information -- particularly announcements and advertisements -- from *Broadcasting* magazine (to which she has subscribed since 1979); personal knowledge based on her more than nine years work in the broadcast field; published guides on how to start up a business; and telephone conversations with programming company representatives (Gifford Orion Exh. 2 p. 2; Gifford Orion Exh. 12, p. 1, 3; Tr. 331, 342).

11. Ms. Moore's original and present estimates of transmitter and studio facilities contemplate(d) a leased transmitter site, a leased studio building, and the purchase of some new and some used equipment (Tr. 332). Her operating budget included salaries for an initial staff of five full time and two to four part-time employees, eventually increasing to a total of no more than ten employees (Tr. 333). Included among the planned full time staff positions were Ms. Moore, serving as general manager and, possibly, also as sales manager at the beginning; a program director; a promotion director; and a bookkeeper who might also function as a receptionist (Tr. 333-336; Tr. 363). The program director and promotion director would both double as announcers. Ms. Moore has a general knowledge of the going rate for hiring a bookkeeper, based on her research on starting up a business in Florida (Tr. 334, 335). Sales personnel would be compensated partially by commission on sales made and partially by salary (Tr. 355). Ms. Moore's staff budget assumed remote control operation by her of the station during non-business hours of the broadcast day, but she has considered the alternative of hiring an overnight part-time operator (Tr. 364, 365).

12. Ms. Moore's estimates of the cost of automated programming for the station were based on her personal experience with the automation system and on telephone conversations with programming company representatives (Tr. 342). Her current, recalculated estimate of $250 per month for automated programming service is actually lower than what she had budgeted in 1988, due to a decline in the cost of such service over the intervening three years (Tr. 345, 358).

13. In February of 1988, Ms. Moore discused with Michael Kahn, president and 50% shareholder of limited partner OCI, the financing of the application and of her estimated costs construction and initial operation of the proposed station. Mr. Kahn told her that Robert M. Merson, the other 50% shareholder of the limited partner, would be providing the financing. Ms. Moore discussed with Mr. Kahn Mr. Merson's financial ability and provided Mr. Kahn with her estimate that the station could be constructed and operated for approximately $200,000 (Gifford Orion Exh. 12, p. 1). Section 5.2 of the limited partnership agreement provides that there is a limit of $200,000 on the limited partner's capital contribution to the partnership, for the purposes of prosecution of the latter's application and for covering the costs of construction and initial operation of the proposed Gifford station (Beard Exh. 3, pp. 19, 20). Mr. Kahn advised Ms. Moore, however, that Mr. Merson not only had sufficient funds to meet his commitment, but that Mr. Merson would also provide a letter indicating his commitment to provide, as a capital contribution, sufficient funds to construct and operate the station, notwithstanding the $200,000 limited specified in the limited partnership agreements (Gifford Orion Exh. 12, p. 1). On March 5, 1988, Ms. Moore received, via Federal Express, Mr. Merson's March 4, 1988, letter (Gifford Orion Exh. 11, p. 3). Ms. Moore understood that letter to be a commitment for the full construction and operation of the station (Gifford Orion Ex. 12, p. 1).

14. Mr. Merson's letter was accompanied by his financial statement (dated January 1, 1988) indicating that he had in excess of ten million dollars in cash, real estate worth two million three hundred thousand dollars, and notes payable of less than three hundred thousand dollars, giving him a net worth of twelve million dollars.

15. At the time the Gifford Orion application was filed (March 8, 1988), Ms. Moore was unaware of any other applications involving OCI that had been filed with the Commission. Over the next year or so, she learned that OCI was the limited partner in a number of other applications (*Id.*).[2]

16. Mr. Merson testified that his financial statement of January 1, 1988 accurately reflected his financial condition at the time, reflecting in excess of $10 million in liquid assets, with total liabilities of less than $300,000. Mr. Merson also affirmed the accuracy of his May 31, 1991 financial statement, which reflects a net worth of $21,164,268, and stated that it remains his intention to provide sufficient funding to construct the proposed station in Gifford, Florida, and to provide operating funds to that station until the station is able to operate on its own (Gifford Orion Exh. 11).

17. Mr. Merson testified that he has provided a line of credit at a bank in Florida for $100,000 which is available to Mr. Kahn for use at his discretion in making investments in whatever businesses he chooses with the understanding that Mr. Merson will be an equal partner with him in these ventures (Tr. 317, 318). With respect to this particular application Mr. Kahn is not providing any financing, all of which is to be provided by Mr. Merson (Tr. 319). Mr. Merson testified that it was his intention to provide funds for the construction of any station in which OCI had an interest (Tr. 319). He provided an initial line of credit of $100,000 for use in the prosecution of these various applications and had agreed to fund the construc-

tion and operating costs of any of which were successful (Tr. 320). He communicated this fact to Mr. Kahn prior to March, 1988, and this remains his intention (Tr. 321).

18. Ms. Moore acknowledged that as Gifford Orion incurs expenses, in each instance, these expenses are paid by Mr. Kahn (Tr. 329). Ms. Moore testified that she takes bills to Mr. Kahn's office and he gives her a check for the bill or, in some instances, she advances the funds out of her own account and he reimburses her (Tr. 330). However, with respect to attorney's fees, all of these fees have been paid by Mr. Kahn (Tr. 330).

Standard Comparative Issue

Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd.

19. As noted above, Gifford Orion is a limited partnership organized under the laws of the State of Florida (Gifford Orion Exh. 1). Gifford Orion was organized by agreement dated March 7, 1988, and a Certificate of Limited Partnership was filed with the Florida Secretary of State on March 10, 1988 (Gifford Orion Exh. 1).

20. The sole general partner of Gifford Orion is Tracy A. Moore, a Black female who resides in Cocoa, Florida (Gifford Orion Exh. 1, 3). The limited partner is Orion Communications, Inc., a Florida corporation formed on October 6, 1987 (Gifford Orion Exh. 1). Tracy A. Moore holds 20% of the equity ownership and 100% of the voting stock in Gifford Orion (Gifford Orion Exh. 1, Tr. 92). Orion is the 80% limited partner in Gifford Orion and owns no voting stock (Gifford Orion Exh. 1).

21. The interests of OCI and its two principals, Michael Kahn (President, Secretary, Treasurer, a Director, and 50% stockholder), and Robert Merson (Vice-President, a Director, and 50% stockholder), are alleged to be passive investment interests (Gifford Orion Exh. 1, p. 2).

22. Ms. Moore intends to work full time (a minimum of 40 hours per week) as general manager of the Gifford station (Gifford Orion Exh. 2, 3). In this capacity, she will establish overall station policy, will bear primary supervisory responsibility for day-to-day management and operations of the station, will be responsible for implementation and administration of the applicant's EEO program, and will bear ultimate responsibility for station compliance with all applicable FCC Rules and policies (Gifford Orion Exh. 2, 3). Neither the limited partner, OCI, nor either of its principals, will be integrated into the operation of the station (Gifford Orion Exh. 3, 4, p. 2).

23. In the event that the Gifford Orion application is granted, Ms. Moore will, prior to commencement of program tests at the Gifford FM station, terminate her present employment with WKCF(TV) in Clermont, Florida, and will move to Gifford proper (Gifford Orion Exh. 2; Tr. 100).

24. From September 1978 to June 1981, she was Community Affairs Director at WFMY-FM, Greensboro, North Carolina. From February 1982 to July 1982, Ms. Moore was an Announcer at WASC(AM), Spartanburg, South Carolina. From August 1982 to August 1984, she was Program-Music Director at WWKT-FM in Kingstree, South Carolina; in that position she produced daily computerized programs, community affairs programs, and did live station remotes. From October 1984 to February 1985, Ms. Moore was an Audio-Journalist for Sheridan Broadcasting, Cocoa, Florida, where she transcribed and edited radio and stringer feeds for anchors and provided technical support for live broadcasts. During Ms. Moore's tenure at Sheridan Broadcasting, she also worked as an Announcer (August 1984 to March 1985) at WJZX(AM), Cocoa, Florida. From April 1985 to July 1986, Ms. Moore worked part time as an Announcer for WMMB(AM), Melbourne, Florida. From July 1986 to January 1988, as Traffic-Operations Liaison, she was responsible for scheduling programs and commercials. Ms. Moore was also responsible for providing quality control for all on-air commercial tapes. In July 1988, she joined WKCF(TV), Clermont, Florida, as Public Affairs Director, with primary responsibility for planning for public affairs strategy for a nine-county market, which includes Indian River County (Tr. 49; Gifford Orion Exh. 2, p. 2).

25. Neither Gifford Orion nor any of its principals has any other interest in any licensed broadcast facility or in any other non-broadcast medium of mass communication (Gifford Orion Exh. 4). OCI, the limited partner in Gifford Orion Broadcasting, Ltd., has an 80% limited partnership interest in each of the following applicant entities: Allen/Johnson Pensacola, Ltd., applicant for a new FM station at Pensacola, Florida (File No. BPH-880324NP, MM Docket No. 90-406); Hill and Hill, Ltd., applicant for a new FM station to serve Edgewater, Florida (File No. BPH-880407NB, MM Docket No. 90-167); Moorhead/Kiedrowski, Ltd., an applicant for a new FM station to serve Tallahassee, Florida (File No. BPH-880324NE, MM Docket No. 90-431); King-Holly, Ltd., applicant for a new FM station to serve Holly Hill, Florida (File No. BPH-880825MW); Stanley/Livingston, Ltd., applicant for a new FM station to serve Lexington, Kentucky (File No. BPH-880825MX) (Gifford Orion Exh. 4). In addition, during the course of this proceeding, Messrs. Kahn and Merson were the recipients of a grant of a construction permit application for a new FM station in Rockledge, FL (File No. BPH-861105MH). *See Rockledge Radio, Ltd.*, 66 RR 2d 1470 (1989).

26. Ms. Moore did not conceive of the idea to submit an application for the Gifford station (Tr. 33). Ms. Moore learned of the allotment at Gifford through a conversation initiated by Nellie Ayers, a fellow employee at Station WKCF(TV) (Tr. 33, 65). Not including Ms. Moore, Ms. Ayers is acquainted with at least two individuals represented to be general partners in OCI limited partnerships in pending applications before the Commission (Tr. 59, 60). Ms. Ayers referred Ms. Moore to Kelly Allen, an OCI representative who is purportedly a general partner in a pending application for an FM station at Pensacola in which OCI holds an 80% limited partnership interest (Tr. 33, 42). Ms. Allen presented Ms. Moore with a choice of two Florida allotments and Ms. Moore selected Gifford (Tr. 110).

27. Ms. Allen then referred Ms. Moore to Kessler and Gehman, an engineering firm which had been previously retained by OCI to prepare an available area map for use in locating a transmitter site (Tr. 35, 66, 67, 87). Ms. Allen provided Ms. Moore with a copy of this map (which bore the legend "Orion Communications, Inc., Gifford, Florida") during their first meeting (Tr. 66, 67). When Ms. Moore had no success in locating a transmitter site, she returned to Ms. Allen who recommended a firm that specialized in such matters (Tr. 35). Ms. Allen also put Ms. Moore in contact with Hardy Popham, who were to serve as her communications counsel (Tr. 34, 65, 87). Ms. Moore wrote a letter to Kessler and Gehman, but they never responded (Tr. 87, 88). She retained an alternate

engineer (Will Hagerty), who was referred to her by Hardy and Popham (Tr. 35). Ms. Allen also put Ms. Moore in contact with OCI's Michael Kahn (Tr. 34).

28. Ms. Moore had not met either principal of OCI before becoming involved with the Gifford Orion application (Tr. 34). She conducted no investigation of Mr. Kahn and no investigation of Mr. Merson, except to inquire of him from Mr. Kahn (Tr. 53). At the time of the hearing, Ms. Moore had never met Mr. Merson (Tr. 34). She first spoke to Mr. Kahn in late February, 1988 and first met him sometime during the first week of March, 1988 (Tr. 34, 67). At that meeting Mr. Kahn presented Ms. Moore with a limited partnership agreement that he had prepared (Tr. 36). The parties signed their partnership agreement the day before Gifford Orion filed its application on March 8, 1988 (Tr. 67, 68). The only major change in the partnership agreement was to change Moore's equity from 10% to 20% (Tr. 36, 92, 93).

29. Ms. Moore did not make any payment in exchange for her 20% equity interest in the partnership (Tr. 61). The Gifford Orion partnership agreement provides that she will receive the 20% interest in exchange for her "management services" (Beard Exh. 3, p. 19).

30. Ms. Moore states that she retained the law firm of Hardy and Popham to handle the filing of Gifford Orion's FCC application at the suggestion of Ms. Allen, OCI's representative. Ms. Moore did not know anyone in that law firm before it was retained to handle the Gifford Orion filing (Tr. 34). The firm of Hardy and Popham handled the filing of at least two other applications for FM facilities in which OCI holds a limited partnership interest, applications at Pensacola and Tallahassee (Tr. 45-48).

31. Subsequent to the filing of Gifford Orion's application, Ms. Moore acknowledged that she contacted Mr. Kahn to advise him that the process of filing the application had been completed (Tr. 68). All of the expenses incurred in the initial filing process were paid directly by OCI, including the FCC filing fee, the initial bill from Hardy Popham and the engineer's bill (Tr. 73, 74). In fact, OCI directly paid all of the bills rendered by Hardy and Popham between the filing of the application and April, 1990, when they paid the law firm's final bill at Ms. Moore's request (Tr. 73, 75).

32. During 1989, Ms. Moore had a number of discussions with Mr. Kahn regarding Gifford Orion's affairs, focusing primarily upon the bills she was receiving from Hardy and Popham (Tr. 69). Ms. Moore admitted that Mr. Kahn dealt directly with Gifford Orion's counsel in the preparation and filing of the May 15, 1989, amendment to Gifford Orion's application, which he signed (Tr. 69).

33. During the pendency of this proceeding, Gifford Orion changed legal counsel from the firm of Walker, Bordelon, Hanlin Hardy (successor to Hardy and Popham) to the firm of Borsari and Paxson (Tr. 39). The new firm currently represents at least three other partnerships in which OCI is the limited partner. Those partnerships are applicants for FM facilities at Pensacola, Tallahassee and Edgewater. All three were formerly represented by Hardy and Popham and by its successor firm (Tr. 42, 45-48, Ameriwave Exhs. 5 and 6). Ms. Moore testified that she felt free to make the decision to change counsel without the permission of OCI (Tr. 112, 113). On April 22, 1990 she wrote a letter to Mr. Kahn which began " . . . [t]his will serve as my request to change legal counsel." During cross-examination she maintained that the letter did not constitute a request and that she was not asking for permission to make such a change (Tr. 113).

34. In the spring of 1990 while Ms. Moore was on vacation, a draft settlement agreement with a competing applicant had already been drafted by the time Ms. Moore returned from her vacation (Tr. 107). Ms. Moore acknowledged that, since she had not authorized Gifford Orion's attorneys to negotiate or draft such an agreement, their actions must have been authorized by Mr. Kahn (Tr. 108). Ms. Moore further acknowledged that following her return from vacation the substance of the settlement agreement was not changed (Tr. 109).

35. Ms. Moore acknowledged that subsequent to her deposition in this proceeding (in November, 1990), she had further discussions with Mr. Kahn regarding Gifford Orion's affairs (Tr. 81). Furthermore, without any prior discussion with or authorization from Ms. Moore, Mr. Kahn issued a check on December 4, 1990, in payment of certain expenses relating to the depositions in this proceeding. Ms. Moore acknowledged that she was unaware that Mr. Kahn had taken this action, had never had any discussion with him regarding deposition expenses and had not authorized him to issue any payment in that regard (Tr. 81, 82).

36. Gifford Orion will install and maintain auxiliary power generators at both the transmitter and studio sites (Gifford Orion Exh. 5).

37. Gifford Orion's proposed 1 mV/m service contour encompasses 66,930 and 1,333 square kilometers (Joint Exh. 1, p. 4).

John E. Morris and Lawrence R. Baker d/b/a Morbak Communications

38. Morbak is a general partnership composed solely of its named partners John E. Morris and Lawrence R. Baker. John Morris is a general partner and a 50% owner of the applicant (Morbak Exh. 2, p. 1). Lawrence Baker is a general partner and a 50% owner of the applicant (Morbak Exh. 2, p. 1).

39. Morbak's principals do not propose to be integrated into the operation of their proposed station.

40. Morbak's principals control station WAPQ(FM), Crestline, Ohio. Additionally, they own non-voting stock representing an aggregate of 15% of the equity in WTRJ Broadcasting, Inc., the permittee of station WTRJ(FM) Troy, Ohio (Morbak Exh. 1, p. 1; and Morbak Exh. 2, p. 1). John Morris is the chief engineer for station WNWS(AM), South Miami, and station WLYF(FM) Miami, Florida (Morbak Exh. 1, p. 1). Morbak proposes auxiliary power generators at the station's studio and transmitter to enable the station to continue service to the Gifford area in the event of emergencies causing power outages (Morbak Exh. 1, p. 2).

41. Morbak's proposed station would encompass 66,930 people and 1,333 square kilometers within its one milivolt per meter service contour (Joint Exh. 1, 4). All this area is well-served (*Id.* p. 3).

Ameriwave, Inc.

42. Ameriwave is a Delaware corporation with three shareholders of record. Gene A. Folden is the president, director and secretary of Ameriwave. William J. Thompson is a vice president and director of the corporation. Mr. Folden and Mr. Thompson each hold 22.5 shares of the 55

shares of issued and outstanding common stock, or a 40.9% voting interest. William F. Sherry is a vice president and director of the corporation. He holds the remaining 10 shares of issued and outstanding stock and thus an 18.2% voting interest in Ameriwave (Ameriwave Exh. 1, p. 1).

43. On March 8, 1988, Ameriwave issued a warrant under which the McLang Company ("McLang") holds the right to acquire 45% of the equity in Ameriwave in the form of non-voting preferred stock[3] (Tr. 144; Ameriwave Exh. 1, p. 1). The principals of McLang are members of the law firm Lukas, McGowen, Nace Gutierrez (Lukas, McGowen) and an engineer affiliated with that firm (Tr. 134, 168, 172). The firm of Lukas, McGowen has represented Ameriwave in this proceeding since the filing of the Ameriwave application (Tr. 134, 161). McLang held the warrant for Ameriwave stock continuously from the time the application was filed, on March 9, 1988, until January 11, 1990 (Tr. 145). That warrant may be exercised at any time between March 8, 1988 and September 7, 1999 (Jiant Exh. 2, p. 1).

44. On January 11, 1990, after the deadline for filing minor amendments in this proceeding, McLang's warrant was transferred into a trust formed for the benefit of McLang (the Trust) (Tr. 145, Ameriwave Exh. 1, p. 1). A stated purpose of the Trust is to insulate McLang from "any direct or indirect influence or involvement in the management or operations" of Ameriwave or the Gifford station (Jiant Exh. 3, p. 1, para. 6, Ameriwave Exh. 1, p. 1). Mr. Folden is the Trustee of the Trust (Ameriwave Exh. 1, p. 1). As Trustee, under the terms of the Trust agreement, Mr. Folden may not

> have or exercise any right or powers in connection with the management or control of [Ameriwave's] business, transact any business for [Ameriwave], act as an employee of [Ameriwave] if his functions . . . relate to the media property of [Ameriwave], serve in any material capacity as an independent contractor or agent with respect to [Ameriwave's] media property, communicate with officers of corporation [sic] on matters pertaining to the day-to-day operations of its media business, perform any services for the corporation materially relating to the media property, with the exception of making loans to [Ameriwave], or have the power to sign for or bind [Ameriwave].

(Jiant Exh. 2, pp. 2, 3, para. 3.1). Ameriwave's sole function is pursuing the license for the Gifford station (Tr. 133).

45. Ameriwave proposes that each of its principals will be integrated into the management of the proposed station on a full-time basis. Gene A. Folden proposes to occupy the position of station manager. He proposes to establish his permanent residence in the Gifford, Florida area, and to work at the radio station on a full-time basis (40 hours or more per week). His duties are to include direct responsibility for implementation of the station's EEO program, designed to ensure non-discrimination with respect to minorities and women and supervision of the station's programming, technical and administrative staffs (Ameriwave Exh. 2).

46. Mr. Folden is currently employed by two communication firms in which he holds an interest, as well as by Ameriyacht, Inc., a firm which designs interiors for motoryachts, of which company he owns 90% and is the chief designer (Tr. 131, 132).

47. William F. Sherry intends to occupy the position of general manager. He proposes to establish his permanent residence in the Gifford, Florida area, and to work at the radio station on a full-time basis (40 hours or more per week). His duties are to include overall responsibility, direction and supervision for all aspects of day-to-day operation of the station (Ameriwave Exh. 3).

48. Mr. Sherry is self-employed by William Sherry Realty, Inc., a commercial real estate brokerage business, which he has owned and operated since 1982 and to which he devotes 50 or more hours per week (Tr. 175-77). Mr. Sherry has advanced no proposal to terminate his involvement with this business (Ameriwave Exh. 3).

49. Mr. Sherry also holds a 20% voting interest in Aragon One, Inc., an applicant (BPH-890914MX) for a new FM station to serve Jupiter, Florida, which is currently pending before the Commission. Susan Folden, wife of Gene A. Folden, holds a 40% voting interest in Aragon One, Inc. (Ameriwave Exh. 1). Both William Sherry and Susan Folden have advanced proposals to be involved in the day-to-day management and operation of the proposed Jupiter, Florida, station (Tr. 179-81). Jupiter, Florida is approximately 40 miles from Mr. Sherry's current residence in Atlantis, Florida (Tr. 175, 178).

50. Mr. Sherry worked as a newscaster for WBAX, Wilkes-Barre, Pennsylvania from 1946 to 1947. He served as program and production manager for WAYE, Waynesboro, Virginia, from 1947 to 1948 and as government information specialist for WPBS, West Point, New York from 1950 to 1952. He worked as an account executive at KYW/WPTZ-TV, Philadelphia, Pennsylvania from 1952 to 1955. He was Sales Manager for WRCV, Philadelphia, Pennsylvania from 1955 to 1960 and general manager for WVOX, New Rochelle, New York from 1960 to 1962. He was sales manager for WIBG, Philadelphia, Pennsylvania from 1963 to 1966, general manager for WJBK, Detroit, Michigan, from 1966 to 1969 and general manager for WSBK-TV, Boston, Massachusetts from 1969 to 1970. Finally, he was executive vice president and general manager for WFTL-WJOY, Fort Lauderdale, Florida from 1970 to 1979 (Ameriwave Exh. 3). Mr. Sherry has not been employed in the broadcast field since 1979 (Tr. 176).

51. William J. Thompson proposes to occupy the position of sales manager. He proposes to establish his permanent residence in the Gifford, Florida area, and to work at the radio station of a full-time basis (40 hours or more per week). His duties will include supervision of the station's sales staff (Ameriwave Exh. 4). Mr. Thompson is currently employed full time, and devotes 60-80 hours per week to his position with the united Transportation Union (Tr. 191). He has advanced no proposal to terminate this current employment (Ameriwave Exh. 4).

52. Ameriwave proposes to install auxiliary power facilities at the station to permit continued service during electrical outages (Ameriwave Exh. 1, p. 2).

53. The 1 mV/m contour of Ameriwave's proposed station would cover an area of 1,117 square miles and a population of 72,778 (Joint Eng. Exh. p. 4).

Jiant Broadcasting Company, Inc.

54. Jiant is a corporation organized under Florida law. Joseph N. Idlette, Jr., is the owner of all of the issued stock and the sole principal in Jiant. He is the president, treasurer and secretary and the sole director of Jiant (Jiant Exh. 1, p. 1).

55. Mr. Idlette, who is Black, proposes to be integrated into the management of Jiant's proposed facility on a full-time, day-to-day basis as the general manager, in which capacity he proposes to devote no less than 40 hours per week to his duties at the station. He proposes to supervise department heads and other employees and hire and fire employees, be responsible for the implementation and administration of the station's Equal Employment opportunity program, and develop and insure effectuation of all objectives and policies of Jiant with respect to the overall operation of the station and the planned programming service. Mr. Idlette proposes to reduce his current business activities "as necessary" to meet this commitment (Jiant Exh. 1).

56. Mr. Idlette is currently employed in the management of Joe Idlette's Landscape Management, a business which he owns and operates as a sole proprietorship (Tr. 207). Mr. Idlette personally operates and manages this business, which employs four full-time employees and one part-time employee (Tr. 207). In addition to managing the business, Mr. Idlette actually goes out and assists his employees with the physical work, as well (Tr. 220, 221). The principal business of Joe Idlette's Landscape Management is landscape management and maintenance, as well as replacement landscaping (Tr. 221). Mr. Idlette has owned this business for nine years and has no intention of giving it up in the event his application is granted (Tr. 207-09, 219, 220). In addition, Mr. Idlette also owns and manages certain apartments along with a partner (Tr. 208-12). He does not propose to discontinue this business if the Gifford application is granted.

57. Mr. Idlette is also an elected member of the Indian River County School Board, a paid position from which he receives income, and has been since 1974 (Jiant Exh. 1; Tr. 208). He was re-elected in 1990 for a four-year term (Tr. 220). He has no intention of resigning from this position in the event his application is granted. (Tr. 208).

58. Mr. Idlette is a long-time local resident of Gifford. He has resided in Gifford from his birth in 1933 to the present, except for two years in the military and a period in school in Daytona Beach, Florida between 1953 and 1956 (Jiant Exh. 1, pp. 1, 2).

59. As a long-time resident of Gifford, Mr. Idlette has been active in a variety of local governmental and civic organizations in and near that community. These activities include:

a) Elected Member, Indian River County School Board since 1974, including service as the vice chairman in 1975 and 1976, chairman form 1977 through 1979 and vice chairman again in 1980 and 1981;

b) Member, Indian River County Chapter of the National Association for the Advancement of Colored People ("NAACP") since its establishment in 1963 or 1964. Finance committee member since 1963-1964. In conjunction with the NAACP, Mr. Idlette initiated on behalf of his children in approximately 1963-1964 the first class action suit against the Indian River Public School System seeking the integration of the local public schools. He has also participated in initiatives to bring street lighting and water to the Gifford area. Within the past three years he has made several appearances before the county as part of an NAACP initiative to establish sewers in the Gifford area (Tr. 218, 219);

c) Member Local Progressive Civic League in Gifford, since its inception in 1960;

d) Steward, Mount Zion AME Church in Gifford, Florida from 1973 to present;

e) Member, Ad Hoc County Wide Recreational Study Commission, from its inception in 1982 until the committee disbanded in late 1985;

f) Member, Ad Hoc Community Advisory Board to Indian River Community College FM Public Radio Station WQCS, Fort Pierce, Florida from 1983 until the committee disbanded in late 1985; and

g) Member, Volunteer Ambulance Association in Vero Beach, Florida, from approximately 1966 to 1969.

60. Jiant proposes to install auxiliary power facilities at the station to permit continued operations during electrical outages (Jiant Exh. 1, p. 3).

61. The 1 mV/m contour of Jiant's proposed station would cover an area of 1,333 square miles and a population of 66,930 (Joint Eng. Exh. p. 4).

Molly Beard Broadcasting, Ltd.

62. Beard is a limited partnership organized under the laws of the State of Florida pursuant to the terms of a limited partnership agreement which was executed March 9, 1988, and filed with the Department of State of the State of Florida on April 5, 1988 (Beard Exh. 1, p. 1). Molly Beard is the sole general partner, and has 50% equity interest in the partnership. Jerry M. Bellairs and Vivian M. Bellairs are the two limited partners and each has a 25% equity interest in the partnership (Beard Exh. 1, p. 1).

63. The Beard limited partnership agreement provides that Ms. Beard, as the sole general partner, has the exclusive right to manage and control the partnership and the limited partners are precluded from participating in the management and control of the partnership, from being employed by the partnership in any capacity, and from communicating with the general partner regarding day-to-day operations (Beard Exh. 1, p. 1).

64. Beard's general partner, Molly Beard, does not have any ownership interest an any media of mass communications. Ms. Beard is employed as the executive general manager of Gulf Stream Broadcasting, the licensee of Station WAKS(FM), Cape Coral, Florida, and KVMT(FM), Vail, Colorado (Beard Exh. 1, p. 2). In the event the Beard application is granted, Ms. Beard will terminate her employment and sever all connections with Gulf Stream Broadcasting (Beard Exh. 1, p. 2).

65. Beard's two limited partners; the Bellairs, own an interest in a broadcast station in the Fort Myers, Florida area (Tr. 269).[4]

66. Molly Beard will be integrated into the management and operation of the proposed station on a full time (minimum 40 hours per week), permanent basis in the role of general manager. Her duties will include supervi-

sion of phases of station operation, including overall supervision of the performance of all station employees in their assigned duties. Her duties will also include overseeing the continuing ascertainment of community needs and interests and formulating responsive programming to meet those needs and interests; formulating station policy; implementing the station's EEO Program and assuring station compliance with the Commission's Rules and Regulations (Beard Exh. 2).

67. Molly Beard, is female and currently resides at 1555 30th Avenue, Vero Beach, Florida, where she has resided since 1987. Previously, from 1985 to 1987, she resided at 1765 33rd Avenue, Vero Beach, Florida. From 1983 to 1985 she resided at 1575 39th Avenue, Vero Beach, Florida. Each of Ms. Beard's residences in Vero Beach has been located within the 1.0 mV/m contour of the station proposed in Beard's application. In the event Beard's application is granted, she will relocate her residence to Gifford, Florida, and establish her permanent residence in that community (Beard Exh. 2).

68. From 1961 to 1965, Ms. Beard was employed as a loan service clerk by the Western Federal Savings and Loan of Denver, Colorado. In 1965, she became employed by United Airlines in reservations. She was promoted to the position of Sales trainer in 1966 and remained with United in that capacity until 1970. From 1970 through 1975, Ms. Beard was the owner and operator of a motel and restaurant in Oakland, Maryland. Contemporaneously, from 1973 through 1978, Ms. Beard was also involved in real estate sales. From 1973 to 1976, Ms. Beard was a buyer for H - P Stores, Oakland, Maryland, a 32 chain of junior department stores (Beard Exh. 2).

69. Molly Beard has been involved in broadcasting since 1978 and has the following experience: In 1978 she became employed at WCBC(AM), Cumberland, Maryland. She was initially hired as a sales representative, but was promoted to sales manager after several months and held that position during the remainder of her tenure with WCBC(AM), from 1978 to 1983. In 1983, Ms. Beard became employed by WGYL(FM), Vero Beach, Florida. She was initially hired to open a second market for the station, but within a few months was promoted to sales manager in 1983 and held that position until 1988. From 1988 through 1989, Ms. Beard was employed by WAVW(FM), Fort Pierce, Florida, as general manager. From August, 1989 to the present Ms. Beard has been employed as executive general manager of Gulf Stream Broadcasting, licensee of WAKS(FM) Cape Coral, Florida and KVMT(FM), Vail, Colorado, and formerly the licensee (until November, 1990) of WKGR(FM), Fort Pierce, Florida (Beard Exh. 2).

70. Molly Beard has been involved in civic, community and charitable activities within the proposed community of license and the service area. In 1984 and 1985, she was a member of the Gifford Middle School PTA and participated in its activities. In 1989, she assisted with three pancake breakfasts, each of which were fundraising events to benefit the Gifford Baptist Church. From 1988 to 1990, she served on the Vero Beach City Council. In this capacity she attended meetings, voted on proposed ordinances, represented the city at various functions, spearheaded drafting and passage of a number of important ordinances, including the water conservation ordinance, sea turtle protection ordinance and an ordinance for the historical preservation of Canopied Road. She also served as the city's liaison on recycling and was instrumental in organizing the curbside recycling program (Beard Exh. 2).

71. From 1988 to 1990, Ms. Beard served on the Indian River County Economic Development Council, which serves the communities of Vero Beach (including Gifford), Fort Pierce and Stuart. In this capacity, she attended monthly meetings, assisted the Council in its efforts to secure new commerce for the county, and reviewed proposals submitted by and met with prospective employers. From 1988 to 1990, she served on the Treasure Coast Regional Planning Council, which serves the communities of Vero Beach (including Gifford), Fort Pierce and Stuart. In this capacity she attended monthly meetings, reviewed building projects for compliance with the State's Comprehensive Land Use Plan, reviewed the comprehensive land use plans of every town and city within the tri-county area for compliance with State plan and participated in the preparation of recommendations which were submitted to the State Planning Department (Beard Exh. 2).

72. From 1989 to present, Ms. Beard served on the Vero Beach Substance Abuse Council. Ms. Beard helped to organize this group, which seeks to educate the public on the extent of substance abuse in city and county and to assure the availability of treatment within the city/county. In addition to being one of its organizers, she has attended the weekly meetings of the Council, participated in securing State and Federal funds, and assisted in establishing funding for a public adolescent treatment program, which is provided through an existing private treatment center. She also actively participates in the Council's efforts to raise or secure funds to increase the availability of local treatment programs for adults and for various educational programs which the Council funds, such as the local D.A.R.E. program and the Just Say "No" Program. She also served on this organization's Finance Committee and handled all publicity during the first year of the organization's existence (Beard Exh. 2).

73. From 1988 to present, Ms. Beard has assisted "Doves," an organization which serves to support "Safespace" a spousal abuse center, located in Vero Beach. In this capacity she has assisted this organization with publicity, prepared its press releases and solicited support from the business community. From 1984 to present, she has assisted with publicity, prepared press releases and organized fundraising events (annually) for the Vero Beach Humane Society. From 1989 to 1990, she participated in the Creative Playground Project, which raised funds from private sector to construct a community playground in Vero Beach. In this capacity she assisted the organization with publicity, prepared their press releases and assisted in solicitation of funds for the project (Beard Exh. 2).

74. From 1984 to the present, Ms. Beard has assisted with publicity for and participated in the Indian River County Beach Cleanup, annual event. From 1989 to 1990, she served on the Sea Oats Action Committee, an organization which plants sea oats to protect the dunes in coastal areas of Indian River County. In this capacity she publicized the necessity for the preservation of dune line and assisted in the organization and implementation of sea oat planting events. From 1984 to present, she assisted Mothers Against Drunk Drivers with publicity and has solicited funds from businesses to assist this organization. In 1988, she organized publicized, participated in and solicited the participation of other donors in a local Bone

Marrow Donor Drive, to benefit local lukemia patients. From 1984 to present, she assisted with publicity for and promotion of various Blood Drives (three or four per year) (Beard Exh. 2).

75. From 1987 to present, Ms. Beard has assisted with the annual Indian River Pilot Club Breakfast, a fundraising event to benefit that organization's charitable projects. Since 1985 she has been a member of Republican Women Aware of Indian River County and has assisted with that organization's "Christmas House," an annual fundraising event to support the projects of that organization. Since 1985 she has also been a member of the Republican Men's Club and the Indian River Womens Republican Club (Beard Exh. 2).

76. Beard proposes to install auxiliary power facilities at the station to permit continued operation during electrical outages (Beard Exh. 1, p. 2).

77. The 1 mV/m contour of Beard's station would cover an area of 1,690 square kilometers and provide service to 94,069 persons (Joint Eng. Exh. p. 4). At least five broadcast stations were identified which provide service during both daytime and nighttime hours, within the primary service areas for all of the proposals in this proceeding (Joint Eng. Exh. p. 3).

Comparative Coverage

78. All of the areas proposed to be served by the applicants presently receive five or more aural services during both daylight hours and at night. The following are the total areas and populations which the applicants will cover within their respective 1 mV/m contours (Joint Exh. p. 4):

Applicant	Area (Sq.Km.)	Population
Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd.	1,333	66,930
John E. Morris and Lawrence R. Baker d/b/a Morbak Communications	1,333	66,930
Ameriwave, Inc.	1,117	72,778
Jiant Broadcasting Company, Inc.	1,333	66,930
Molly Beard Broadcasting, Ltd.	1,690	94,069

Conclusions of Law

Financial Qualification Issue - Gifford Orion

79. The general partner Tracy Moore testified that prior to the execution of the application, she had prepared written cost estimates and had projected expenses through construction and three months of operation to be $200,000. Moore also testified that as it developed sometime between the filing of the application and the specification of the financial issue against Gifford Orion, she had irretrievably misplaced her written budget. However, the loss of this documentation does not invalidate Moore's estimate of costs. The Commission does not require preparation of a written budget. The *Baltimore Radio Show*, 4 FCC Rcd 6437, 6444 (1989) (subsequent history omitted).[5] Her reconstructed budget indicates that the funds needed continue to be in the amount of $200,000.

80. The link between Moore and Gifford Orion's source of funds is Michael Kahn. Kahn is the 50% owner of OCI. OCI is a corporation formed to make investments. It is the limited partner of Gifford Orion. Robert Merson is the other 50% owner of OCI. It is Merson who is providing the funding for Gifford Orion. Moore, herself an experienced broadcaster, discussed with Kahn prior to the filing of the application the financing of the application and the estimated costs of construction and initial operation in the amount of $200,000. Kahn told Moore that Merson would provide the funds as a capital contribution. In turn and prior to the filing of the application, Merson provided Moore with a letter wherein he committed funds to the project. He also supplied Moore with a financial statement which stated his total assets, liquid assets, total liabilities and net worth. The statement indicated Merson had over $10 million in cash and debts of less than $300,000. It is argued that Moore should be faulted for not requiring a more detailed financial statement, but it is deemed that it was reasonable for Moore to have relied on the statement presented in light of Merson possessing available cash in the approximate amount of $10 million. To rule otherwise would be to raise form over substance. Although Merson's letter mentioned funding in the amount of $200,000, he did not enumerate the cost of initial operation. However, in his direct testimony and his testimony on cross-examination, he made it clear that he knew at the time that the proposed station would require construction and operating funds and that he at all times intended to provide sufficient funds to construct and operate the station even beyond three months. In any event, the $200,000 Merson committed to make available would have covered all of the costs Moore projected. At the hearing Merson provided an additional financial statement which showed his net worth at $21,164,268. Merson's commitment letter did not specify the interest rate, the term or requirement of collateral because the commitment is for equity funding and not a loan.

81. In sum, the record clearly indicates that Gifford Orion's estimate of construction and initial operation costs are adequate and that it had at all times the reasonable assurance of sufficient funds to meet these costs. The financial issue specified against Gifford Orion IS RESOLVED in its favor.

Standard Comparative Issue - Gifford Orion

82. Gifford Orion claims 100% full-time integration credit for its proposal to integrate into management its sole general partner. However, Gifford Orion is entitled to only 20% full-time integration credit -- the extent of Moore's equity interest. The record indicates that Michael Kahn, the 50% owner of Gifford Orion's limited parter OCI, was involved not only in Gifford Orion's pre-organizational activities, but in its post-organizational activities as well. The Commission has held that where one or more of an applicant's purportedly passive owners actively participates in prosecuting its application after the applicant has formally organized itself as a limited partnership, the likelihood is that it will not observe the active-passive distinction in the future. *See Royce International Broadcasting*, 5 FCC Rcd 7063 (1990). In *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission has held that where an owner has assumed an active role after the applicant has

declared that the owner will be passive, that owner's interest will be attributed to the applicant for integration purposes, regardless of the nature of the passive owner's involvement. What further undermines confidence that Gifford Orion's principals will honor the insular provisions of its limited partnership agreement is the fact that Moore did not pay for her 20% equity interest. She received it on the basis of performing "management services." Hence, Moore has offered no appreciable *quid pro quo* for her ownership share. *See Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6315, 6317 (1990). In light of the foregoing, it is ruled that Gifford Orion only may receive 20% full-time integration credit for Moore's proposed participation in management of the proposed station.

83. Additionally, Gifford Orion is awarded qualitative enhancement credit for Moore's proposed future residence in the proposed service area. *Bradley, Hand Triplett*, 89 FCC 2d 657, 661 (Rev. Bd. 1982). Also, Gifford Orion is credited for Moore's minority status. *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985); *Horne Industries, Inc.*, 98 FCC 2d 601 (1984). Gifford Orion is also entitled to substantial credit for Ms. Moore's broadcast experience. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

84. Gifford Orion is also credited with its proposal to install and utilize auxiliary power generating equipment. *Addendum to 1965 Policy Statement*, 6 RR 2d 861 (1966).

85. *Diversification.* Neither Gifford Orion nor Ms. Moore has any attributable interest in any media of mass communications. However, since the insular provisions of Gifford Orion's limited partnership agreement are disregarded, Gifford Orion must have attributed to it Mr. Kahn's and Mr. Merson's interest in the applicant which was awarded the permit for the FM station in Rockledge, Florida. This permit was granted to the applicant after the "B" cut-off date and there was no pledge of divestiture made. Furthermore, the Rockledge station is located near enough to the Gifford area to warrant the imposition of a moderate to substantial diversification merit.

Morbak Communications

86. Morbak neither seeks nor is entitled to any integration credit in this proceeding.

87. Morbak is credited with its proposal to install and utilize auxiliary power generating equipment. *Addendum to 1965 Policy Statement, supra.*

88. *Diversification.* Morbak is charged with the interests of its principals in WAPQ(FM), Crestline, Ohio, and WTRJ(FM), Troy, Ohio. Accordingly, Morbak should be assessed a slight to moderate diversification demerit. *CJI Broadcasting, Inc.*, 95 FCC 2d 544, 549 (1983); *Joseph Bahr*, 92 FCC 2d 114 (1982); *Policy Statement, supra.*

Ameriwave, Inc.

89. Ameriwave seeks 100% quantitative credit on the basis of its proposal to integrate each of its three principals into the management and operation of its proposed station. However, Ameriwave is entitled to no integration credit based upon the proposal of its principals to be integrated into the day-to-day management of its proposed station. Messers. Folden, Sherry and Thompson are currently employed on a full-time basis and none has proposed to terminate his current occupation. It is well established that the Commission will not credit a proposal to work two full-time jobs simultaneously. Where a party proposing integration proposes to accommodate outside activities, as opposed to terminating them outright, it must be demonstrated how it will be capable of doing so. *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (1987), rev. den. 3 FCC Rcd 1181 (1988). Where the applicant in question has failed to carry the burden of making a convincing showing in this regard, integration credit has been consistently denied. *Washoe - Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952 (Rev. Bd. 1988), recon. den. 3 FCC Rcd 5631 (1988). Ameriwave has utterly failed to carry this burden. The fact that Ameriwave's principals intend to relocate to the community of license does not prove that their current business interests will not interfere with effecting their respective integration proposals. Therefore, Ameriwave is not entitled to any quantitative integration credit.

90. The integration proposal of Gene A. Folden and of William F. Sherry may not be credited for additional reasons. As Trustee of the McLang Trust, Mr. Folden is bound by the provisions of the McLang Trust Agreement, dated January 11, 1990 which proscribes him from having or exercising "any rights or powers in connection with the management or control of" Ameriwave's business, "to transact any business for" Ameriwave or to act as an employee, independent contractor of Ameriwave with respect to any media property. Folden has not indicated that he intends to terminate his position as Trustee in the event Ameriwave's application is granted. Therefore, under established Commission precedent, his integration proposal may not be credited. *Knoxville Broadcasting Company*, 103 FCC 2d 669, 680-83 (Rev. Bd. 1986). William F. Sherry has advanced two conflicting integration proposals as of the June 8, 1990, deadline, having in addition to his proposal to be integrated in this proceeding, advanced a full-time integration proposal in the application of Aragon One, Inc. for a new FM station at Jupiter, Florida. These conflicting integration pledges lead to the conclusion that Mr. Sherry's pledge is inherently unreliable and not worthy of credit. *See Julia S. Zozaya*, 67 RR 700, 702-703 (Rev. Bd. 1990).[6]

91. The warrant held by McLang Company to acquire up to 49% of the equity of Ameriwave must be treated as an attributable interest, based upon established precedent. Since there is no evidence that the warrant will not be converted into stock, the potential 49% equity interest it represents must be attributed for comparative purposes, unless it is found to be utterly passive. *Signal Ministries, Inc.*, 104 FCC 2d 1482, 1490 (Rev. Bd. 1986). McLang Company's interest may not be deemed passive due to the involvement of its principals' law firm in the provision of legal services to Ameriwave. The Commission has held as a matter of law that attorneys who hold equity interests in an applicant and who simultaneously perform legal services for the applicant cannot under any circumstances be considered mere "passive investors." *Scioto Broadcasters*, 5 FCC Rcd 5158 (1990). Consistent with established precedent, the active involvement of the law firm of Lukas, McGowan, Nance Gutierrez renders McLang Company's warrant attributable for comparative purposes. *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4093 (1988). The fact that McLang Company ultimately assigned the warrant to McLang Trust is without legal significance here, since that assignment was not effective until January 11, 1990, some 18 months subsequent to the July 6, 1988, deadline for the filing of amendments as of right and, thus,

constituting comparative upgrading. (*See:* FCC Public Report No. 14189, p. 11, released July 6, 1988, accepting the Gifford, Florida, Channel 234A, applications for tender.) Therefore, were the integration proposals of Ameriwave's principals credited, Ameriwave would be entitled to a maximum 51% quantitative credit.

92. Were Ameriwave awarded any quantitative integration credit, it would be entitled to qualitative enhancement credit for the proposed future residence of Messrs. Sherry, Folden and Thompson, and slight credit for Mr. Sherry's broadcast experience. *Bradley, Hand and Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982); *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, (1965).

93. Ameriwave is also credited with its proposal to install and utilize auxiliary power generating equipment. *Addendum to 1965 Policy Statement, supra.*

94. *Diversification.* Neither Ameriwave nor any of its principals has any attributable interest in any media of mass communications.

Jiant Broadcasting Company, Inc.

95. Jiant's sole principal, Joseph N. Idlette, proposes to integrate into the management of the Gifford station by devoting no less than 40 hours per week. Mr. Idlette plans on meeting this commitment by reducing, but not discontinuing, his present business activities. Although Mr. Idlette proposes full-time integration, he credibly could not devote more than a part-time effort to the Gifford station. He has made no arrangement to terminate activities in his landscape management business, his co-management of apartment complexes or his position as a board member on the Indian River County School Board. Thus, Mr. Idlette has made no commitment to broadcasting as his sole employment. The *Policy Statement, supra*, makes it clear that the Commission is primarily interested in full-time participation; and to the extent that time spent drops below full time, credit will drop sharply. *Policy Statement, supra.*

96. Mr. Idlette's 100% part-time integration is entitled to qualitative enhancement credit for his past and current residence in the proposed community of license (*Policy Statement, supra*), his minority status (*Radio Jonesboro, Inc., supra)* and a slight enhancement credit for civic participation. His membership on the Indian River County School Board is a paid position and his activities in connection with the Indian River County Chapter of the National Association for the Advancement of Colored People and the Volunteer Ambulance Association are remote in time.

97. Jiant is credited with its proposal to install and utilize auxiliary power generating equipment. *Addendum to 1965 Policy Statement, supra.*

98. *Diversification.* Neither Jiant nor any of its principals has any attributable interest in any media of mass communications.

Molly Beard Broadcasting, Inc.

99. Beard is entitled to full (100%) quantitative integration credit for the proposed integration of its general partner, Molly Beard, into the day-to-day management and operation of the proposed station. Beard is also entitled to qualitative enhancement credit on the basis of the proposed integration of Ms. Beard.

100. Beard is credited with qualitative enhancement credit for Ms. Beard's proposed future local residence, as well as her current and past service area residence. *Policy Statement, supra.* Substantial credit is also accorded Beard on the basis of Ms. Beard's participation in numerous and varied local and service area civic activities. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6440-41 (1989).

101. Beard is credited with its proposal to install and utilize auxiliary power generating equipment. *Addendum to 1965 Policy Statement, supra.*

102. *Diversification.* Neither Beard as a legal entity nor its general partner has any attributable media interest. The interests of limited partners are not attributable for diversification purposes. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). Thus, Beard suffers no diversification demerit.

Comparative Coverage

103. When areas and populations are well-served, the Commission has awarded a light coverage preference to applicants proposing substantially greater overall coverage than their opponents. *Simon Geller*, 90 FCC 2d 250, 268-69, (1982) (subsequent history omitted) (coverage superiority of four times more area and 315,000 persons). For less significant differences, a very slight preference has been awarded. *Barton Broadcasting Co.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986) (coverage difference of 44,215 persons or 27%); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (coverage differences of 42,000 persons or 8%, 140,000 persons or 34%, and 180 persons or 44%). Finally, where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 FCC 5520, 5521 (1989) (coverage difference of 36,206 persons or 2%); *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962, 1963 (Rev. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979 (coverage difference of 12,000 persons or 5%).

104. In view of the above, Molly Beard merits a very slight preference over the other applicants. Moreover, while a close call, Ameriwave merits a very slight preference over Moore, Morbak and Jiant because of a nearly 9% advantage in population coverage.

Ultimate Conclusions

105. Beard is the clear winner. Morbak does not propose integration. Ameriwave has been denied integration credit. Gifford Orion has been awarded 20% full-time integration and Jiant received 100% part-time integration credit. The difference between Gifford Orion and Jiant's integration credits and Beard's 100% full-time integration credit is decisional. Beard's quantitative advantage exceeds the differential which the Commission recognizes as reflecting a clear quantitative advantage. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-66 (1989) (utilizing the Hirschman-Herfindahl Index, a differential of 1250 constitutes a clear quantitative advantage).

Accordingly, *IT IS ORDERED* that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Molly Beard Broadcasting, Limited (File No. BPH-880310MS) *IS GRANTED*; the applications of Tracy A. Moore d/b/a Gifford Orion Broadcasting, Ltd. (File No. BPH-880308MK), John E. Morris and Lawrence R. Baker d/b/a/ Morbak Communications (File No. BPH-

880309ME), Ameriwave, Inc. (File No. BPH-880309MF) and Jiant Broadcasting, Inc. (File No. BPH-880310ME) *ARE DENIED*.[7]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The following applications were also designated, but were dismissed: Ronnie L. Mayes by *Order* (FCC 90M-1639), released June 13, 1990; Media One, Inc. by *Order* (FCC 90M-1685), released June 15, 1990; Press Broadcasting Company by *Order* (FCC 90M-1950), released July 5, 1990; Gonzo Communications, LP, Ana R. Avello, Harlan Communications, Ronald Crider by *Order* (FCC 90M-2047), released July 13, 1990; and Triple H Broadcasting, Inc. by *Order* (FCC 90M-3337), released October 23, 1990.

[2] *See* Gifford Orion Exh. 4, pp. 1-2, which sets forth the interests in other applications of Orion Communications, Inc. Those applications are identified in the exhibit by applicant names, locations, and file numbers. All those applications were filed after that of Gifford Orion, and all have since been dismissed. Official notice is hereby taken of the disposition of those other applications, pursuant to the following orders: *Memorandum Opinion and Order*, FCC 90M-4061, released December 26, 1990 (Edgewater, FL); *Order*, FCC 91M-2816, released September 12, 1991 (Pensacola, FL); *Order*, FCC 91M-1402, released April 22, 1991 (Tallahassee, FL); *Order*, FCC 91M-1186, released April 4, 1991 (Lexington, KY); and *Order*, FCC 91M-2887, released September 20, 1991 (Tice, FL).

[3] The Articles of Incorporation of Ameriwave provide for the issuance of only common voting shares (Tr. 150, 158).

[4] While on the stand, Ms. Beard could not recall the exact nature of the Bellairs' interest, but noted that it was referenced in the Beard application (Tr. 269). Administrative notice of the Beard application and official Commission records is taken to note that the interest is in Sunshine Broadcasting, Inc., which holds the authorization for Station WSUV(FM) at Fort Myers Villas, Florida (File No. BPH-820825BY).

[5] In counter argument it is suggested that documentation at the time of the filing of the application did not exist and that Moore failed to make any significant efforts to estimate construction and operation costs as required by Commission precedent. But the argument is unwarranted speculation. Ms. Moore appeared as trustworthy as any other witness who testified in this proceeding. Furthermore, Gifford Orion's estimate of construction and initial operation costs in the amount of $200,000 appears to be reasonable in light of the finding in this proceeding that Molly Beard's estimate of $140,000 was adequate. *See Memorandum Opinion and Order*, FCC 91M-3478, released December 19, 1991.

[6] By amendment filed May 13, 1992, Ameriwave reports that the application of Aragon One, Inc. for an FM station at Jupiter, Florida (BPH-890914MX) has been dismissed. The amendment has been accepted for reporting purposes by *Order*, FCC 92M-597, released May 26, 1992. Commission policy does not allow comparative upgrading by post designation amendments.

[7] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Digital Mobile Communications, Inc. - California — File No. 63500-92-11-BFW

Notice of Apparent Liability for Forfeiture Penalty for Station KNKK991 in the Public Land Mobile Service at Walnut Grove, California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 27, 1992; Released: June 2, 1992

By the Chief, Mobile Services Division:

1. On July 11, 1990, the Commission granted an authorization to Digital Mobile Communications, Inc. - California (Digital) to operate on frequency 931.6375 MHz at Walnut Grove, California. Digital constructed the facilities and commenced operations on or about June 11, 1991.[1] On July 17, 1991, Digital filed FCC Form 489, Notification of Status of Facilities.

2. Section 22.9(b)(1) of the Commission's rules states:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Digital commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . shall be liable to the United States for a forfeiture penalty.

We find that Digital's failure to file a FCC Form 489 until July 17, 1991, constitutes willful and repeated conduct within the term of the statute.

4. Pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), 56 Fed. Reg. 37665 (1991), *on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for a common carrier failing to file required forms is $30,000. Consistent with the *Policy Statement*, we are adjusting downward the forfeiture because failing to file FCC Form 489 is a relatively minor violation and because Digital voluntarily disclosed its failure to file the form. Therefore, we are assessing a forfeiture totaling $6,000.[2]

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Sec. 1.80, IT IS ORDERED that Digital Mobile Communications, Inc. - California IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934.

6. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Sec. 1.80(f)(3), that within thirty (30) days of the release date of this Notice, Digital Mobile Communications, Inc. - California SHALL PAY the full amount of the forfeiture OR FILE a written response explaining why the forfeiture should be reduced or not imposed. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Written responses concerning reduction or remission should be sent to: Federal Communications Commission, Common Carrier Bureau, Mobile Services Division, 1919 M Street, N.W., Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Counsel for Digital states that documentation in Digital's possession relates only to construction and, thus, Digital is unable to provide the exact date on which the transmitter was activated. Digital estimates, however, that the station was rendered operational approximately one week after completion of construction, *i.e.*, on approximately June 11, 1991.

[2] In *Digital Mobile Communications, Inc. - Pittsburgh*, 7 FCC Rcd 1751 (Mobile Serv. Div. 1992) (*Digital Mobile*), we assessed a $6,000 forfeiture against another Digital licensee in similar circumstances for a failure to file FCC Form 489. There, we pointed out: (1) that because of prior violations of the same kind by various wholly-owned subsidiaries of Digital's parent corporation, Graphic Scanning Corporation, future multiple violations of the Commission's rules would not be tolerated; and (2) that upward adjustment criteria imposing higher forfeiture amounts would be assessed if similar offenses were discovered in the future. Only because the instant Digital violation occurred before our warning in *Digital Mobile* (thus, not a "future" violation), we are refraining from utilizing upward adjustment criteria in assessing a higher forfeiture than $6,000 at this time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES and	File No. E-90-347
NEW JERSEY BELL TELEPHONE COMPANY, Defendants.	File No. E-90-348

ORDER

Adopted: May 22, 1992; Released: June 2, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 29, 1990, Telecom*USA, Inc. (hereinafter "Telecom") filed the above-captioned formal complaints against The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for the Defendants' alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On May 13, 1992, the parties filed a joint motion seeking dismissal of the complaints. We are satisfied that dismissal of the the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED. pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-68

In re Applications of

MODESTO BROADCAST GROUP	File No. BPH-880229MB
HARRY S. McMURRAY	File No. BPH-880301MP
MODESTO COMMUNICATIONS CORPORATION	File No. BPH-880301NC
BCD LIMITED PARTNERSHIP	File No. BPH-880301OS
THOM REINSTEIN COMMUNICATIONS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-880301OU
PAMELA R. JONES	File No. BPH-880301OY

For Construction Permit for a
New FM Station on Channel 230A
in Modesto, California

Appearances

Jerrold Miller, Esquire, on behalf of Modesto Broadcast Group; *B. Jay Baraff, Esquire, Aaron P. Shainis, Esquire*, and *Lee J. Peltzman, Esquire*, on behalf of Harry S. McMurray; *John Griffith Johnson, Jr., Esquire*, on behalf of Modesto Communications Corporation; *Kathryn R. Schmeltzer, Esquire, John K. Hane, Esquire*, and *Matthew Zinn, Esquire*, on behalf of BCD Limited Partnership; *J. Richard Carr, Esquire*, and *Audrey L. Allison, Esquire*, on behalf of Thom Reinstein Communications, a California Limited Partnership; *Michael J. Wilhelm, Esquire*, on behalf of Pamela R. Jones; and *Y. Paulette Laden, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: May 22, 1992; Released: June 5, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order (HDO)*, 5 FCC Rcd 1143 (1990), the Commission designated for hearing thirteen mutually exclusive applications. Thereafter, six of these applications were dismissed,[1] and the following seven applications remained in hearing status: Modesto Broadcast Group (MBG); Harry S. McMurray (McMurray); Modesto Communications Corporation (MCC); Juan Manuel Ayala (Ayala); BCD Limited Partnership (BCD); Thom Reinstein Communications, A California Limited Partnership (Reinstein); and Pamela R. Jones (Jones).

2. The following issues were designated against the remaining applications:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by BCD would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

By *Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1306, released May 22, 1990, the air hazard issue against BCD was resolved in its favor by summary decision.

3. By *Memorandum Opinion and Order*, FCC 90M-1347, released May 25, 1990, the following issues were added against Jones:

> To determine the facts and circumstances regarding the filing of the numerous applications by Pamela R. Jones, and, based thereon, whether she has violated the provisions of Section 73.3555 and Section 73.3518, and/or abused the Commission's processes.
>
> To determine whether Pamela R. Jones has violated Section 1.65 of the Commission's rules in connection with her failure to timely amend her application to update the status of her media interests.
>
> To determine whether Pamela R. Jones is financially qualified to build and operate her proposed station, particularly in light of her other pending applications, and whether her financial certification was/is false.

By *Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1627, released June 12, 1990, hearing and hearing procedures on the first issue designated against Jones were deferred until the Commission ruled on Jones' appeal of the return of her application for Homewood, Alabama.

4. By *Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1345, released May 25, 1990, the issues were enlarged against MBG as follows:

> To determine whether Modesto Broadcast Group has reasonable assurance of the availability of a transmitter site;
>
> To determine whether Modesto Broadcast Group had reasonable assurance of the availability of the transmitter site when it filed its application, and, if not, whether the specification of such site and the certification relating thereto constituted misrepresentation;

To determine whether Modesto Broadcast Group had a reasonable basis at the time it filed its application on which to certify that it was financially qualified, and, if not, whether its financial certification was false; and

To determine, in light of the evidence adduced under the foregoing issues, whether Modesto Broadcast Group possesses the basic qualifications to be a Commission licensee.

By *Memorandum Opinion and Order*, FCC 90M-2883, released September 13, 1990, the financial issue specified against Modesto Broadcast Group was expanded, as follows:

To determine the terms and conditions of the Pacific Valley National Bank loan, whether Modesto Broadcast Group has reasonable assurance of the availability of this loan, and, based thereon, whether Modesto Broadcast Group is financially qualified.

5. A prehearing conference was convened on May 8, 1990, and hearing sessions were held on October 1-5, 15-16, and 23-24, 1990. Thereafter, by *Memorandum Opinion and Order* of the Presiding Judge, FCC 91M-13, released January 4, 1991, the following issue was added:

To determine the extent of Michael Sturtevant's involvement and culpability in violations of Section 73.1745 of the Commission's rules which occurred at Station KLOC(AM) while he was general manager, and in willful misrepresentations during hearing testimony regarding same, and the effect of such involvement and/or misrepresentations upon his basic qualifications.

6. Further hearing conferences were convened on January 23 and April 10, 1991, and a hearing session was held on April 24, 1991. The record was closed on April 24, 1991. (Tr. 2303.) In the meantime, Juan Manuel Ayala entered into a settlement agreement with Reinstein pursuant to which the application of Juan Manuel Ayala was dismissed. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 91M-1419, released April 24, 1991.)

7. Findings of Fact and Conclusions of Law were filed by the applicants on June 14, 1991. (The Bureau filed findings on January 4, 1991.) Reply findings were filed by the applicants on June 28, 1991.[2]

FINDINGS OF FACT

MODESTO BROADCAST GROUP (MBG)

Structure and Integration

8. MBG is a California limited partnership comprised of three general partners: Michael T. Sturtevant, Carol S. Benson, and Rosa M. Magana; and two limited partners: Peter M. Sturtevant and Darra Sturtevant. (MBG Ex. 1, p. 3.) The partners of MBG hold equity interests in the partnership as set forth below:

Michael Sturtevant	40 percent
Carol Benson	20 percent
Rosa Magana	20 percent
Peter Sturtevant	10 percent
Darra Sturtevant	10 percent

(MBG Ex. 1, p. 3.)

9. Paragraph 15 of the original MBG Limited Partnership Agreement signed by the general partners and the limited partners, states, in pertinent part:

The Limited Partners shall not have either the obligation or the right to take part, directly or indirectly, in the active management or control of the business of the Partnership, except as otherwise permitted in this Agreement and except for the following:

(a) Acting as a contractor for or an agent or employee of the Partnership or a General Partner, or an officer, director, or shareholder of a corporation General partners.

(b) Consulting with and advising a General Partner with respect to the business of the Partnership.

(MBG Ex. 1, p. 5.)

Further, paragraph 23 of the Agreement provides that "[a]ll General Partners shall have equal rights in the management and conduct of the Partnership business," and "[a]ny difference arising with respect to the ordinary course of the Partnership business shall be decided by a majority of the General Partners." (MBG Ex. 1, pp. 2, 8.)

10. The record includes an amendment to the MBG Limited Partnership Agreement which deleted paragraph 15 of the Agreement and inserted in its place the following language:

No Limited Partner shall be involved in any material respect in the management or operation of the Partnership's media enterprises. No Limited Partner shall act as an employee of the Limited Partnership, shall serve in any material capacity as an independent contractor, or agent of the Partnership, shall communicate with the General Partner(s), on matters pertaining to the day-to-day operations of the Partnership business, shall vote on the removal of the General Partner(s), shall perform any services to the Partnership materially related to its media activities, and shall not become actively involved in the management or operation of the media business of the partnership. The Limited Partners may vote on the admission of additional General Partners, but the General Partner(s) shall have the right to veto such admissions.

The Limited Partners shall contribute no services and shall take no part in or interfere in any manner with the management, conduct or authority of the Partnership business and shall have no right or authority to act for or by the Partnership, except as otherwise required by all present and future laws of the State of California which are applicable to Limited Partnerships.

(MBG Ex. 1, pp. 14-15.)

The amendment was executed by all of MBG's partners. The signatures of Michael Sturtevant and of Magana are dated June 18, 1990. Benson's signature is dated June 20, 1990. (MBG Ex. 1, p. 15.) The amendment also deleted paragraph 23, and a new paragraph 23 was inserted which states:

> Each new General Partner shall have rights in the management and conduct of the Partnership business in direct proportion to the amount of capital contributed by each General partner. Specifically, Michael Sturtevant shall have two votes having contributed $4,000.00. Carol Benson shall have one vote, having contributed $2,000.00. Rosa Magana shall have one vote, having contributed $2,000.00. Any difference arising with respect to the ordinary course of the Partnership business shall be decided by a majority vote of the General Partners, with each Partner voting the number of votes above enumerated.

(MBG Ex. 1, p. 15.)

11. According to Lawrence C. Beaver, MBG's local attorney in Modesto, California, on or about February 16, 1988, Michael Sturtevant requested that Beaver draft MBG's Limited Partnership Agreement. According to Beaver, Sturtevant told him that certain restrictions upon the rights of the Limited Partners were to be included in the Limited Partnership Agreement. (MBG Ex. 5, p. 1.)

12. Beaver dictated the MBG Limited Partnership Agreement to his secretary from a standard California form and from a sample limited partnership agreement that had been provided to him by MBG's communication's counsel. (Tr. 132-133; MBG Ex. 5, pp. 1-2.) The sample agreement provided to Beaver included language virtually identical to that set forth in the amendment to paragraph 15 of MBG's Limited Partnership Agreement. (MBG Ex. 5, p. 7.)

13. According to Beaver, after the MBG Limited Partnership Agreement had been executed, he heard nothing more from any of the MBG partners regarding the Agreement for over two years. According to Michael Sturtevant, he did not read the original partnership agreement, and Rosa Magana said that she didn't review the agreement before signing it. (Tr. 358-359, 372, 537.) Until June 1990, the original Limited Partnership Agreement controlled the rights and responsibilities of MBG's partners. Other than knowing that MBG's partners opened a bank account, Mr. Beaver had no personal knowledge of the activities of the general or limited partners subsequent to the completion of the original agreement. (Tr. 129.) Beaver received a telephone call in June 1990 from MBG's communications counsel, who asked Beaver to review the MBG Limited Partnership Agreement, and specifically those sections relating to the restrictions upon the rights of limited partners and the voting rights of the general partners. According to Beaver, it was then that he first realized that the MBG Limited Partnership Agreement that he had prepared was "confusing" and that it did not "clearly state the desires of the partners in these two areas." He thereupon prepared an amendment to the Limited Partnership Agreement modifying those two provisions. (MBG Ex. 5, p. 2.) According to Beaver, although paragraph 15 as originally written would have allowed the limited partners to take certain actions, the amendment to paragraph 15 did away with those provisions. Beaver asserted that he had incorrectly dictated the original paragraph 15. Beaver claimed that he had been in a hurry to get the Agreement completed and did not take an opportunity to proofread it before it was executed. (Tr. 127.)

14. Michael Sturtevant has taken the lead concerning MBG's application. He hired FCC counsel, MBG's engineer, and local counsel. He takes care of correspondence from counsel. Michael Sturtevant signs checks for MBG and keeps the financial records of who has contributed and how much, as well as all other partnership records. (Tr. 367, 380-382.) There have been no partnership meetings. Michael Sturtevant decided what the terms of the limited partnership agreement would be, and he told Ms. Magana and Ms. Benson that he wanted Peter and Darra Sturtevant involved financially as limited partners. (Tr. 193, 390, 396.) Michael Sturtevant was responsible for preparing the FCC application. (Tr. 363.) Neither Rosa Magana nor Carol Benson was involved in setting up the public file or in handling the newspaper publications. (Tr. 212-213, 385-386.)

15. Michael Sturtevant told Rosa Magana about the availability of the Modesto channel and asked her if she wanted to be a part of the applicant. (Tr. 354.) Sturtevant told her that it would cost her $5,000 or $6,000 for the license and hearings. (Tr. 377-379.) Rosa Magana had no involvement in selecting Carol Benson; that was Michael's idea. (Tr. 375.) Ms. Magana took no part in the preparation or filing of MBG's application and had no contact with MBG's engineer or attorney. She had nothing to do with locating the transmitter site or formulating MBG's budget and has not seen the budget. (Tr. 362-363, 375, 377.) Ms. Magana does not know how much money the others have contributed. (Tr. 366.) She was not involved in arranging financing for MBG and was not asked to furnish any financial statements to Pacific Valley National Bank on which MBG is relying for a bank loan. (Tr. 364-365, 381.)

16. Ms. Benson did not prepare any portion of the MBG application. (Tr. 188-189.) She did not work on MBG's budget with Michael Sturtevant and did not involve herself in the process of locating a transmitter site. (Tr. 190-191.) Michael Sturtevant told Ms. Benson that he wanted Cecil Lynch to help with the site location. (Tr. 211.) Ms. Benson did not recall whose idea it was to form a limited partnership as opposed to a general partnership. (Tr. 193.) She indicated that it was probably Michael Sturtevant who suggested that she have a 25 percent voting interest and a 20 percent equity interest. There was no bargaining involved. Ms. Benson accepted Michael Sturtevant's suggestion. (Tr. 201-202.) Ms. Benson was never asked to provide a balance sheet or any financial information to Pacific Valley National Bank. (Tr. 194.) Copies of correspondence from counsel do not go to Ms. Benson directly, and she does not receive bills or copies of bills from FCC counsel. (Tr. 205-206.) Michael Sturtevant makes the cash calls. Ms. Benson doesn't know who keeps the books. (Tr. 208-209.) She thinks checks require two signatures, but she's never been asked for her signature. She doesn't know how much MBG has spent on prosecuting its application. (Tr. 209-210.) According to Ms. Benson, Michael Sturtevant has been "the point man" or the managing general partner. (Tr. 207.)

MICHAEL STURTEVANT

17. Michael Sturtevant will work full time (at least 40 hours per week) at the Modesto FM station as the General Manager and will be in charge of all aspects of the station's operation, including but not limited to, establishing and coordinating a budget, setting all station policies, hiring and firing personnel, and assuring compliance with all federal and local laws and regulations. He will directly supervise the news department, sales department, and engineering department. (MBG Ex. 4, p. 2.)

18. Sturtevant resided in Modesto from 1975 to 1983 and elsewhere within the 1 mV/m contour of the station from 1944 to 1974, with the exception of a six-month period in 1967-1968 and for abou' a year in 1971 when he lived outside the service contour. He will move to Modesto upon grant of MBG's application. (Tr. 425-427; MBG Ex. 4, p. 1.)

19. Michael Sturtevant was a founding member and board member of the McHenry Mansion Museum, Modesto, from 1984 to 1986; fund raising division leader, Modesto YMCA, in 1986; volunteer volleyball coach and league organizer, Modesto YMCA, from 1982 to present; organized lip sync contests through the local area high schools, 1988 to present which were fund raisers for the high school Hispanic scholarships. He participated as a VIP planning committee member for the 1990 Cerebral Palsy Telethon. He has been a member of the Modesto Rotary Club, 1982 to present; youth soccer league coach during the months of August to November from 1979 to 1982, and during the months of August to November from 1983 to 1989; member, Oakdale youth soccer league board of directors and volleyball coach, from 1984-1985, and 1986 to present regarding volleyball coach. Sturtevant was the President of Cloverland Elementary School site counsel for the academic years 1983-1984 and 1985-1986; and member of the United Way Year Around Planning Committee from late 1989 to the present. (MBG Ex. 4, pp. 2-3.)

20. Michael Sturtevant has been the General Manager of KLOC(AM), Modesto, since 1981. As general manager he has been responsible for setting and maintaining a budget, creating and enforcing policy in all aspects of the station operation and ensuring compliance with all federal, state, and local laws. (Tr. 457; MBG Ex. 4, p. 1.) At the hearing, Mr. Sturtevant admitted that he didn't do a very good job complying with FCC requirements and that he had violated Commission rules for which a forfeiture was imposed. (Tr. 464.) Sturtevant's broadcast experience also included program director, account representative, and copywriter for KTRB(AM) and KHOP(FM) Modesto, California, from 1974 to 1977. Sturtevant will sever all connections with KLOC(AM) if Modesto Broadcast Group is the successful applicant in this proceeding. He is currently president and minority shareholder of the KLOC licensee. (MBG Ex. 4, pp. 1-2.)

ROSA M. MAGANA

21. Ms. Magana will work full time (at least 40 hours per week) at the Modesto FM station as the Business Manager. In this position, she will supervise and train employees and set policy in areas such as accounting, billing, budgeting, and traffic. She will terminate any commitments she may have which would interfere with her working at the Modesto station on a full time basis. (MBG Ex. 2, pp. 1-2.)

22. Rosa Magana is a Hispanic female and has resided in Modesto from 1969 until the present. Her broadcasting experience includes office manager, bookkeeper, traffic manager at KLOC(AM), Ceres, California, from 1981 to October 1990[3]; accounts receivable and traffic at KFIV(FM) Modesto, California, 1976-1979 and 1980-1981; and secretary and traffic at KBEE(AM & FM) Modesto, California, 1979-1980. Ms. Magana is committed to sever all connection with KLOC Broadcasting if MBG is the successful applicant in this proceeding. (MBG Ex. 2, p. 1.)

23. Ms. Magana's civic activities within Modesto and the proposed service area include member and fund raising volunteer for the Modesto Chapter of Soroptomist International, June 1987 to present; Modesto Venture Club, participating in club fund raising activities for charity, June 1986-June 1987; member and fund raising volunteer for an annual event at St. Joseph's Church, Modesto, 1980 to present; American Cancer Society Chile Cookoff volunteer, 1986 to 1987. For approximately four months, during the mid to late 1980's, Magana volunteered to assist illegal immigrants seeking amnesty from violation of the immigration laws; also, a volunteer for C. F. Brown Elementary School (where her children attended school), computer lab, two hours per week, March 1988 to June 1988. (Tr. 370-371, 397-398; MBG Ex. 2, p. 2.)

CAROL S. BENSON

24. Carol S. Benson, a female, proposes to work full time, at least 40 hours per week, at the Modesto station as the Sales Manager. In this position, she will supervise and train employees and set policy in all aspects of advertising sales and station promotions. (MBG Ex. 3, p. 1.)

25. Ms. Benson will resign her present employment and sever all connection with KOSO if Modesto Broadcast Group is the successful applicant in this proceeding. (MBG Ex. 3, p. 1.)

26. Ms. Benson was news director at station KOSO(FM), Patterson, California, from 1990 to present; from 1982 to 1990 she was news director of KTRB(AM), Modesto, California (and its "sister" FM station KHOP(FM) from 1984 to 1987). She was the Morning News Anchor at KTRB(AM)/KHOP(FM) from 1982 to 1984. She was a talk show host from 1975 to 1977, then from 1977 to 1979 she was a news anchor, traffic manager, copywriter, assistant operations manager for KTRB(AM)/KHOP(FM), Modesto, California. (MBG Ex. 3, p. 2.)

27. Ms. Benson has been a resident of Modesto from 1976 to the present. Her civic activities within Modesto and the proposed service area are extensive and varied. Some are as follows: membership in the Modesto Rotary; on the Board of Directors of "HAVEN"; co-founder, past president, past Board of Directors member of the Stanislaus Women's Resource Center; president and newsletter editor of the Women's Network of Stanislaus County (Tr. 341); founder and past president of the San Joaquin National Organization for Women in 1975; member of Memorial Hospital's Foundation Board from 1988 to present. (Tr. 342.) Chaired the "Pacesetters" volunteers for the United Way campaign in 1990 and has been a member of the United Way Communications Committee; a former head of California N.O.W. Affirmative Action Task Force; a former vice-president of the Stanislaus County Commission for Women; a former editor of the "Women's Voices" newsletter, and a former editor of the Women's Resource Center newsletter. (Tr. 342-343.) Ms. Benson was a former member of the Modesto Chamber of Commerce Visitors

and Convention Bureau Committee; a member of the National Women's Political Caucus of Stanislaus County (Tr. 343.); a member and volunteer part-time publicist of Stanislaus Association for Prevention of Cruelty to Animals (Tr. 344). Ms. Benson has also been a judge and celebrity emcee for various functions conducted by organizations such as the March of Dimes and the Lukemia Society of America. She has been a guest speaker, lecturer, panelist, and moderator in connection with other civic activities. (MBG Ex. 3, p. 4.)

Diversification

28. MBG has no ownership or other interest in any other medium of mass communications. (MBG Ex. 1, p. 1.) Michael Sturtevant is the President and 9.77 percent shareholder of Clock Broadcasting Company, Inc., licensee of Station KLOC(AM), Ceres, California. He is also general manager of KLOC. (Tr. 532; MBG Ex. 4, p. 1.) Mr. Sturtevant has stated that he will sever all connection with KLOC(AM) if MBG is the successful applicant. (MBG Ex. 4, p. 2.) During cross-examination, Mr. Sturtevant also acknowledged that he is a director and a shareholder (less than five percent) in Midway McKittrick Oil Company which is a 28.8 percent shareholder in KLOC. (Tr. 532.)

29. At the time of the hearing, Ms. Magana was an officer, but not a stockholder of the licensee of KLOC(AM).[4] She proposed to sever all connection with KLOC's licensee if MBG is successful in this proceeding. (MBG Ex. 2, p. 1.) On November 7, 1990, MBG filed a petition for leave to amend which reported that Ms. Magana terminated her employment at KLOC on October 26, 1990. (*See, Order* of the Presiding Judge, FCC 90M-3820, released December 4, 1990.) At the time MBG's application was filed, Carol S. Benson was the news director of Stations KTRB(AM) and KHOP(FM), Modesto, a management-level position. (Tr. 200.) MBG did not list this interest in its application or in any subsequent amendment, and Ms. Benson made no divestiture commitment relating to this position. Ms. Benson became news director of Station KOSO(FM), Patterson, California, in February 1990, but she did not report her position with KOSO or propose to resign from that position until July 2, 1990. (Tr. 327-328.)

Auxiliary Power

30. MBG proposes to install auxiliary power equipment. (MBG Ex. 1, p. 1.)

Site Issues

31. The specification of site issues was predicated on allegations that MBG failed to secure reasonable assurance of the availability of the transmitter site specified in its application, and that it misrepresented the availability of its proposed site. The allegations were supported by the affidavits of Ruth Jobe, the owner of MBG's proposed site, and by Brandi Hart, Ms. Jobe's granddaughter, who was present during the discussions relating to the site between MBG partner Michael Sturtevant and Ms. Jobe.

32. From November 1986 until the end of May 1988, Brandi Hart worked at radio station KLOC as an account executive. The General Manager of KLOC was Michael Sturtevant. (Reinstein Ex. 5, p. 1.)

33. In early 1988, Mr. Sturtevant asked Ms. Hart if he could accompany her on some of her sales calls and if she could stop at her grandmother's house because he knew she owned a piece of land and he was thinking about getting another radio station and wanted to talk to her about using her land for a radio tower for the new station. Hart arranged a meeting with Ms. Jobe, and Hart and Sturtevant drove to Ms. Jobe's house. (Tr. 159.) Mr. Sturtevant explained to Ms. Jobe that he was thinking about trying to obtain another radio station and asked whether Ms. Jobe would consider selling him part of her land or leasing it to him for a radio tower. According to Hart, Sturtevant explained to Jobe that she would not be able to keep horses on the land with a tower in place, but that she could keep cattle and this statement upset Ms. Jobe. Mr. Sturtevant further explained that he was not sure that he was really going to get the station, did not know how much land he was going to need, and was not even sure that the land was big enough. (Reinstein Ex. 5, p. 1.)

34. Sturtevant wanted to look at the land, so he, Hart, and Jobe walked outside. There was a small corral where animals, either horses or cattle or both, were being kept. According to Sturtevant, Jobe said that the corral area was the only place where a tower could be put, and she did not want to lose pasture land. Sturtevant indicated that the tower would not pose a problem for keeping the animals in that area as it would take up only a small amount of land. (Tr. 573.) Sturtevant was aware that both horses and cattle graze on the KLOC nighttime site. (Tr. 582.)

35. According to Sturtevant, he was concerned whether the corral area could accommodate the tower and guy wires. He obtained the dimensions of the land from either Jobe or a hired hand, and said he would have to check with his consulting engineer. He would get back to Ms. Jobe if the engineer confirmed that the land was sufficient for the tower. (Tr. 577.)

36. Sturtevant provided the dimensions of the land to his engineer, Cecil Lynch, who reported a few days later that the land could be used. According to Sturtevant, he went back to Ms. Jobe, this time alone, told her that there was enough land for his use and that he would specify her land in his application, and she agreed to this. Sturtevant then called Lynch and told him to proceed with the preparation of the application. (Tr. 578-579.)

37. According to Sturtevant, after his second visit to Ms. Jobe, he had no conversation with her until 1990. He and Hart did not discuss the use of Jobe's land after their first visit to view the land. (Tr. 175, 580-581.)

38. MBG introduced a statement of Michael T. Sturtevant, dated May 2, 1990, in response to the site availability issue. (MBG Ex. 7.) Michael Sturtevant stated as follows:

> In November of 1987, I was looking for an antenna site for MBG's proposed FM station. Brandi Hart, who was then an employee of KLOC, where I was (and still am) general manager, told me that her grandmother, Ruth Jobe, had some property that might work. Brandi talked to her grandmother on the phone to see if she was interested, and told me that she might be. Brandi and I drove to the property and met Mrs. Jobe there. On that first visit, I talked with Mrs. Jobe for only a few minutes because I was not sure that the property was big enough for our needs. I spoke to my consulting engineer about the property size, and he told me that the site would work. I then went back to Mrs. Jobe.

> There was a meeting with her in her home which included Brandi, myself, and a man named "Dick" who worked for Mrs. Jobe. We discussed the possibility of purchased [sic] or lease of the land and Mrs. Jobe said that she preferred a lease. However, because of the time involved in getting approval of the application we decided to wait until we had the construction permit before executing a lease. I specifically remember telling Mrs. Jobe that I would apply for the radio station using her property as the antenna site and she said, "okay."
>
> (MBG Ex. 7, pp. 1-2.)

39. According to Mr. Sturtevant, his statement (MBG Ex. 7) was obsolete and identical to that furnished with his opposition to the initial Reinstein Motion to Enlarge. (Tr. 466.) Such statement was wrong in significant respects. After reading Ms. Hart's account of the facts in the reply to the motion to enlarge issues and hearing the deposition testimony of Ms. Hart and Ms. Jobe, Mr. Sturtevant realized that Ms. Hart had not been present at both of the meetings with Ms. Jobe; and, also, that he had inverted the order of his meetings. The first meeting was the lengthy one in which he met with Ms. Jobe and "Dick." The initial conversation dealt with location of the tower, whether it was compatible with other use of the property, the construction of a new access road, etc. (Tr. 573.) The second conversation -- at which Ms. Hart was not present -- was brief and held after Mr. Sturtevant had verified the suitability of the property with his consulting engineer. At that last meeting, according to Sturtevant, he told Ms. Jobe he was going to specify her property in MBG's application and she assented. (Tr. 579.)

40. According to Ms. Hart, the first time she had heard that her grandmother's land had been specified as a radio tower site was when Thom Reinstein telephoned her and asked if she was aware that Sturtevant had represented in his application that he had been given permission to use her grandmother's land for a tower site. Ms. Hart advised Reinstein that she had been at a meeting, and that she was willing to give a statement indicating that her grandmother had never given permission for use of the land. At a later date, Mr. Reinstein showed Ms. Hart a statement signed by Sturtevant in which he described two meetings that had allegedly taken place with Ms. Hart present. Sturtevant believed that Hart was vindictive about being fired from KLOC, that she had threatened to get even with him, and that she had convinced her grandmother to lie about not granting permission to use her site. Ms. Hart gave Reinstein another statement in which she denied influencing her grandmother to falsely state that she had never given permission for use of the land and denied that there had ever been two meetings with her grandmother and Mr. Sturtevant. Ms. Hart maintains that there was only one meeting which took place and that she never heard again from Mike Sturtevant or anyone else about using her grandmother's land for a radio tower site. (Reinstein Ex. 5, pp. 2-3.)

Financial Issue

41. Sturtevant estimated that it would cost approximately $320,000 to construct the facility and $82,800 to operate for three months without revenue. Thus, MBG's total estimated cost of construction and operation were approximately $400,000. (MBG Ex. 6, p. 4.) Included in this estimate was $350 per month for land for the transmitter site.

42. To meet these costs, Sturtevant approached S. B. Flake, the Vice-President of Pacific Valley National Bank in Modesto. (Tr. 56-57.) Flake has known Sturtevant since 1980, as he was the account officer on two loans to KLOC. The first was an acquisition loan, while the second was a restructuring loan in 1985. (Tr. 61.) Flake knew that Sturtevant was the manager and a minority shareholder in KLOC. (Tr. 90.) Flake is familiar with a loan transaction involving his bank and Sturtevant for construction of his residence and has access to Sturtevant's personal financial statement and tax returns. Sturtevant and Flake had several conversations regarding the new station. (Tr. 61-62.)

43. On February 18, 1988, Flake issued a letter stating, *inter alia*:

> Thank you for your loan application of $500,000.00 in the name of "Modesto Broadcasting Group". I understand that funds will be used for the construction and operation of a new F.M. radio station to be located in Modesto, California.
>
> Pacific Valley National Bank will be pleased to entertain your application subject to the following:
>
> 1. Three year proforma on Modesto Broadcasting Group.
>
> 2. Current financial statements and three (3) years previous tax returns on all principals concerned.
>
> Rates and terms for this type of request would be as follows:
>
> 1. Start up loan, normally carried an SBA guarantee.
>
> 2. Term, amortized for seven (7) years and due and payable in five (5) years.
>
> 3. Personal guarantees on all principals.
>
> 4. Rate would be P.V.N.B. Base Rate (currently 10.00%) plus 1.25% and a loan fee of 0.50%.
>
> (MBG Ex. 6, p. 1.)

According to Sturtevant, Flake's February 1988 letter represented reasonable assurance of the availability to MBG of the proceeds of a loan for the construction and operation of MBG's proposed new station. (MBG Ex. 6, p. 2.)

44. Steven B. Flake has been Vice-President of Pacific Valley National Bank since at least the beginning of 1988. (Tr. 56-57.) At the time the February 18, 1988, letter was written, Mr. Flake's lending authority on his own signature was "0." Mr. Flake's lending limit was $100,000 on an unsecured basis and at that time there was a condition that an additional signature of a loan officer in the bank must accompany Flake's signature to cover loans up to and including $100,000. When he issued the February 1988 letter, Mr. Flake did not have a *pro forma* on MBG and did not have financial statements or tax returns from all three general partners of MBG. (Tr. 63-64.) He knew only

the purpose of the partnership, and he knew the financial background of only Michael Sturtevant. (Tr. 71.) Mr. Flake knew the identities of the other general partners, but he did not have any financial information about them at the time of the February 18, 1988, letter. He did not know the ownership percentages of any of the general partners. (Tr. 71-73.) The limited partners were never identified to Mr. Flake, and he never saw any financial information pertaining to the limited partners. (Tr. 84-85.) Mr. Flake has known Michael Sturtevant since 1980 and, as previously noted, had access to his personal financial statements and tax returns. He said he was familiar with the loan transaction on the Sturtevant residence and loans that the bank had made for KLOC. (Tr. 61.) Mr. Flake thought that Michael Sturtevant's interest in KLOC was between 10 and 20 percent. (Tr. 71.)

45. The February 18, 1988, letter was not circulated to anyone else in the bank nor was it submitted to the loan committee. (Tr. 64-65, 74.) According to Mr. Flake, there was no bank commitment at that time to make the loan sometime in the future. Flake said that he felt comfortable that he could package the loan request and secure the loan. (Tr. 79.) However, it has been the policy of Pacific Valley not to do start-up loans. (Tr. 64, 75-76.) If a loan was requested that was collateralized properly, the bank would make the loan as an exception to its general policy. In 1988, Mr. Flake discussed with Mr. Sturtevant the following forms of collateralizing a loan: (1) a very strong guarantor; (2) a very strong liquid collateral position; and (3) an SBA loan program. (Tr. 77-78.) Mr. Flake originally anticipated that the SBA would issue a guarantee and that was a condition of the February 1988 letter. (Tr. 67.) However, Mr. Flake never discussed the loan with the SBA. Mr. Flake had no knowledge as to whether Michael Sturtevant took steps to obtain a SBA guarantee. (Tr. 87-88.) According to Flake, the bank would not issue this type of letter to someone it was not familiar with, or that it did not intend to follow through with the formal application and approval by the bank loan committee. (Tr. 96.)

46. On July 16, 1990, Sturtevant received from Mr. Flake a second letter which resulted from Sturtevant's request to clarify the involvement of MBG's limited partners in the bank's consideration of the loan. (MBG Ex. 6, p. 2.) The second letter indicated that it was intended to "clarify" the February 1988 letter, and stated that the earlier letter "was meant to give . . . [MBG] reasonable assurance of such a loan, although it was not a binding commitment for the loan." In the second letter, Flake stated that he thereby wished "to confirm our oral discussion regarding the requirements and terms of the loan." The July 1990 letter further stated:

> The bank's willingness to make this loan was, and is based on our familiarity with you and your successful stewardship of KLOC. Thus, although the letter stated that we would require tax returns of all principals, we would look to see only that the general partners had been gainfully employed for each of the past three years. You had orally assured, me that this was indeed the case. We anticipate no difficulty in your obtaining an SBA guarantee of the loan and our reasonable assurance is not based on prior SBA approval.
>
> In addition, while our letter stated that we would require the written guarantee of all partners, I informed you orally that the limited partners would not be required to guarantee the loan. In all other respects, the terms of our February 18, 1988, letter remain applicable.

(MBG Ex. 6, p. 3.)

47. In February 1988, the bank anticipated the loan would be guaranteed by the SBA. It was not until September 1990 that the bank learned that the SBA does not guarantee broadcast loans. (Tr. 64, 88.) Mr. Flake did not discuss this proposed loan with the SBA at any time. (Tr. 80.)

48. On September 27, 1990, Flake sent Sturtevant yet another letter regarding Pacific Valley National Bank's contemplated loan to MBG. In relevant part, this third letter stated:

> As set forth in my letter to you dated February 18, 1988, Pacific Valley National Bank and you contemplated a Small Business Administration-guaranteed loan since this was a start-up loan. I did not realize until attending a seminar in September of this year covering Small Business Administration loans and upon receiving Small Business Administration materials and follow-up discussion in connection therewith that there was an exception in the S.B.A. policy against guaranteeing such loans for a radio station.
>
> Originally, since this was considered a start-up loan, the Bank needed to have a very secure position, and although we early on in 1988 discussed other types of collateral security that would be adequate to satisfy the Bank's security needs, we settled on the S.B.A. guarantee, since my prior experience with our Bank submitting such loan packages to S.B.A. for approval on start-ups of small business, I felt confident that the S.B.A would accept yours.
>
> I attempted in my second letter to clarify the February 1988 letter but apparently only confused everyone concerning the Bank's position. To reiterate, the Bank will require the following:
>
> 1. Three year pro forma on Modesto Broadcast Group . .
>
> 2. Current financial statements and three years of previous tax returns on all three general partners . .
>
> 3. In accordance with your original request in 1988, since this is a start-up loan, the Bank requires collateralization of a very liquid and secure type, and in lieu of the S.B.A. guarantee, Pacific Valley National Bank will accept a pledge of $500,000.00 evidenced by certificates of deposit with Pacific Valley National Bank and held at Pacific Valley National Bank properly secured and documented, such certificates being pledged by your father, A. Judson Sturtevant.

* * *

4. Personal guarantees would be required from all general parters (we would not require financial information or guarantees from Limited Partners).

* * *

This letter indicates a willingness to approve such loan upon receipt of all of the above items, in addition, of course, to the Federal Communications Commission construction permit, such that you have met all conditions.

(MBG Ex. 9, pp. 1-2.)

49. According to Mr. Flake, the Small Business Administration guarantee provision was included in the February 1988 letter to MBG in order to provide a level of comfort to the bank for the type of start-up loan that was contemplated in that letter. Flake acknowledged that at the time that he issued the letter to MBG in February 1988, he did not check to find out whether it was appropriate to require a guarantee of the loan's repayment by the SBA. (Tr. 64.) The SBA guarantee was a condition to his issuance of the February 1988 letter, and that even at the time of his issuance of the second letter to MBG in July 1990, the SBA guarantee was a condition to Pacific Valley National Bank's arrangement with MBG. (Tr. 67.) Flake never provided Sturtevant with any information about how MBG might go about getting an SBA loan guarantee. Flake had no knowledge as to whether Sturtevant took any steps to see whether MBG could obtain an SBA loan guarantee. (Tr. 87-88.) Mr. Flake did not have any contact with the SBA regarding its willingness to guarantee such a loan to MBG. (Tr. 80.)

50. The September 17, 1990, letter was drafted by Mr. Flake and approved by the bank's counsel. (Tr. 81.) The bank's Chairman of the Board, its President, and its Senior Vice-President were aware of this letter, reviewed it, and permitted it to be submitted. The bank has knowledge that A. Judson Sturtevant is in a position to supply the requested certificates of deposit. (Tr. 92-93.) The bank's Chairman has known A. Judson Sturtevant for more than 15 years and is personally aware of his current financial status. He is comfortable that he has the financial wherewithal to supply the specified collateral. (Tr. 103.)

51. A. Judson Sturtevant is familiar with the Pacific Valley National Bank's letter of September 27, 1990. He is willing to meet the terms of that letter with respect to placing and pledging certificates of deposit totalling $500,000 with that bank in accordance with the requirements of the letter. He has adequate funds to purchase these certificates of deposit. (MBG Ex. 10.) A partial balance sheet reflects that A. Judson Sturtevant has a net worth in excess of $2,000,000. This includes cash and securities in excess of $1,000,000 and mutual funds in excess of $1,000,000. (MBG Ex. 12.)

Section 73.1745 Issue Involving Sturtevant

52. As previously noted, Michael Sturtevant has been the general manager of KLOC for approximately ten years. (Tr. 2212.) In a letter to Clock Broadcasting Co., Inc. (Clock), the licensee of KLOC, dated March 24, 1987, the Commission's Field Operations Bureau Office in Livermore, California (FOB) issued a Notice of Apparent Liability for Forfeiture (NALF) to Clock. The NALF cited violations of Section 73.1745 of the Commission's rules by KLOC that had been discovered in an on-site investigation at KLOC by FOB inspectors on February 5, 1987. The NALF recited that KLOC had been monitored by the FOB from January 29, 1987, to February 5, 1987, and that during that time the station had not changed from its authorized nighttime operation to its authorized daytime operation at sunrise, as required by the Commission's license authorizing the operation of KLOC. (Reinstein Ex. 8, p. 1.)

53. The Commission's license for KLOC specifies that KLOC is authorized to operate from different transmitter sites during daytime hours and at night, with 500 watts of power during the day and 2,500 watts of power at night.[5] KLOC operates with different directional antenna radiation patterns for day and night. At night, coverage is lost in Merced County and gained in San Joaquin County, which includes Stockton. (Tr. 2147-2148, 2216; Reinstein Ex. 7, p. 1.) KLOC's nighttime transmitter was "brand new" in late 1986 and early 1987, whereas the daytime transmitter at that time was considered by Sturtevant to be "an old piece of junk." As a result, KLOC's sound, when the station was operating with its authorized nighttime facilities, was better than when the station was operating with its authorized daytime facilities. (Tr. 2264.)

54. KLOC's promotional material lists the city of Stockton, California, as second only to Modesto among the station's "Major Cities of Coverage." The station's format is described as "Contemporary Spanish," and there are more Hispanics in Stockton than in Modesto. Hispanics also represent a higher percentage of the population in Stockton than in Modesto. (Tr. 2257-2258; Reinstein Ex. 10, p. 2.) KLOC's signal in Stockton, when the station is operating with its authorized daytime facilities, is "very poor," according to Les Lester, KLOC's former chief engineer. (Tr. 2119.) When operating with its authorized nighttime facilities, KLOC enjoys a signal level in Stockton that is considered by Lester to be "usable." (Tr. 2115-2116.)

55. Sturtevant's involvement in KLOC's violations of Section 73.1745 is the subject of contradictory testimony offered by Lester, on the one hand, and by Sturtevant, on the other hand. Les Lester worked for KLOC from the spring of 1984 until January 25, 1987, as the contract chief engineer responsible for repair and maintenance of station equipment. (Tr. 2100-2101.) According to Lester, sometime in December 1986, he discovered that the night pattern had remained on during the day for several consecutive days. After he informed the morning jocks that they were required to switch to the day pattern in the morning, Mr. Sturtevant came to Lester and told him that KLOC was trying to expand sales into Stockton. Because the day pattern did not cover Stockton, Sturtevant instructed Lester to leave the night pattern on. According to Lester, Sturtevant said KLOC was conducting a sales program in Stockton with a sales executive promoting the station, and they had to be able to hear the station in Stockton. (Tr. 2153-2155; Reinstein Ex. 7, p. 1.) According to Lester, he told Sturtevant that it was illegal to operate the station daytime with nighttime power and KLOC was going to interfere with KNEW, Oakland, which was on the first adjacent channel, but Sturtevant was not concerned. (Tr. 2156.) Mr. Lester indicated that Mr. Sturtevant asked

him to take his field strength meter to Stockton to find out if the signal was usable. Mr. Lester took the meter to Stockton in late December 1986 and took measurements at three locations in downtown Stockton to find out if the night pattern covered Stockton with a usable signal during the time that the station was operating with the nighttime pattern continuously during the day. According to Mr. Lester, he reported back to Mr. Sturtevant that the signal was usable. (Tr. 2111-2116; Reinstein Ex. 7, p. 1.) In January 1987, Mr. Lester attended a meeting of broadcast engineers in Concord, California, and was told by the Chief Engineer of KNEW, Oakland, that the station was receiving interference from KLOC. He reported to Mr. Sturtevant that another station was complaining and it would be a problem to continue operation daytime on the night pattern. According to Mr. Lester, Mr. Sturtevant indicated that he would continue operating on the night pattern during the daytime to improve coverage to Stockton. Mr. Lester stated that except for one day in January 1987, KLOC operated continuously with nighttime power during the day from sometime in December 1986 until the FCC inspector arrived on February 5, 1987. (Tr. 2121-2122, 2138-2141, 2169; Reinstein Ex. 7, p. 3.) Lester believes his public accusation that Sturtevant knowingly caused KLOC to violate Section 73.1745 "probably destroyed my business." (Tr. 2173.)

56. According to Sturtevant, in late 1986, KLOC's daytime transmitter was off the air for more than a day, and the station stayed on the air by switching to its night pattern. (Tr. 2219-2220.) The disc jockeys commented to Mr. Sturtevant that they "had lots of calls from listeners indicating we sounded a lot better" and Sturtevant's reaction was "Good." (Tr. 2221-2222.) Sturtevant told Lester the station sounded better, and the listeners liked it. Sturtevant asked Lester what would happen if they kept operating with the night transmitter. According to Sturtevant, Lester advised him that they might be causing interference to KNEW and said he would check with that station. (Tr. 2223-2225.) Sturtevant then informed the KLOC operators to disregard written notations on the KLOC daily logs that reminded the operators to switch KLOC's operation at sunrise from the authorized nighttime facilities to the authorized daytime facilities. (Tr. 2239.) According to Sturtevant, Lester later had a meeting with a representative of KNEW and then reported back to Sturtevant that KNEW was not experiencing any interference problems. Further, according to Sturtevant, Lester did not tell him that KLOC should not operate with its authorized nighttime facilities during the day, nor did Lester mention to Sturtevant the possibility that someone might complain to the Commission about such operation. (Tr. 2224-2225.)

57. Sturtevant thought that there would be a possibility that it was not right for KLOC to operate its authorized nighttime facilities during the day. (Tr. 2282.) Sturtevant did not specifically ask Lester whether it was illegal for KLOC to so operate. (Tr. 2263.) Sturtevant did not call anyone at KNEW in order to determine if KLOC was causing interference to KNEW. (Tr. 2269.) Sturtevant did not consult with KLOC's Washington, D.C., legal counsel in order to determine if it was lawful for KLOC to operate with its authorized nighttime facilities during the day. (Tr. 2270-2271.) Sturtevant did not consult KLOC's license to determine if such operation was lawful. (Tr. 2281.)

58. According to Sturtevant, he believed that it was "okay" to operate KLOC's nighttime facilities during the day, as long as no one complained about interference. (Tr. 2264.) He stated that he did not realize that such operation was improper until the FOB inspection of KLOC. (Tr. 2230-2232.) Sturtevant had been in the broadcasting business for nine years at the time of KLOC's violations of Section 73.1745. (Tr. 2235.) On a previous occasion when KLOC had operated with its authorized nighttime facilities during the day in order to test those facilities, the station had obtained an authorization from the Commission to do so; no such authorization had been received by KLOC for its operation of its nighttime facilities during daytime hours in late 1986 and early 1987. (Tr. 2231-2232.) Sturtevant conceded that he does not need to have engineering expertise to understand the manner KLOC was licensed to operate by the Commission. (Tr. 2261.) According to Sturtevant, he had relied upon "the engineer," and that doing so was "pretty stupid, it showed a lack of judgment." (Tr. 2231.)

59. According to Sturtevant, he did not ask Lester to go to Stockton with a field strength meter and that KLOC did not institute any promotional activity in Stockton in late 1986/early 1987. (Tr. 2226.) However, promotional material prepared by Sturtevant for KLOC contains a map showing coverage of Stockton and states that "KLOC is the Spanish radio station for the Merced, Turlock, Modesto, Stockton areas." (Tr. 2245-2247; Reinstein Exs. 9, 10.)

60. A listing of KLOC revenue from the Stockton area reflects the following:

November 1985	--	$ 998
December 1985	--	1,408
January 1986	--	421
February 1986	--	33
March 1986	--	66
November 1986	--	2,280
December 1986	--	3,156
January 1987	--	1,080
February 1987	--	1,296
March 1987	--	600

(Tr. 2273-2275; MBG Ex. 13.)

61. According to Sturtevant, KLOC had a limited sales effort in Stockton in late 1986/1987. It had three or four customers, who were serviced by one sales person. Sturtevant does not believe KLOC ever had a larger number of advertisers in the Stockton area, although at one time, in October 1981, the station generated $4,414 in revenue from Stockton. KLOC has listeners in Stockton as shown by its appearance in the Stockton Arbitron ratings. (Tr. 2296.)

62. Cecil Lynch appeared as a character witness on behalf of Sturtevant. Lynch is a broadcast consulting engineer who has lived in Modesto all his adult life. (Tr. 2190.) He has had occasion to speak about Mr. Sturtevant or hear others speak about him in the Modesto community. (Tr. 2191.) To the best of Lynch's knowledge, Sturtevant's reputation for truth and veracity is excellent. (Tr. 2191-2192.) Lynch has never heard anyone say anything derogatory about Sturtevant's truthfulness or veracity. (Tr. 2194.) Lynch has done work for KLOC and Sturtevant in the past, but his most recent work was in connection with the nighttime application of KLOC which was filed in about 1982. (Tr. 2211.) In his own mind, Lynch equates truthfulness and veracity with ethics. (Tr. 2196.)

HARRY S. McMURRAY (McMurray)

Structure and Integration

63. Harry S. McMurray is an individual applicant. In the event his application is granted, he will be a sole proprietor, the 100 percent owner of the resulting station. (McMurray Ex. 1, p. 1.)

64. McMurray proposes to work at the proposed FM radio station in Modesto as the General Manager on a full-time basis (*i.e.*, at least 40 hours per week). He will be responsible for the overall management of the station. McMurray will oversee the activities of all station departments, determine major station policy, establish and maintain community ties, design promotions and take other actions to improve the efficiency and success of the station and otherwise supervise the day-to-day operation of the station. To effectuate his integration commitment, he will resign from any current employment in the event his application is granted. (Tr. 730-731, 890; McMurray Ex. 2, p. 1.)

65. McMurray has resided in Modesto, California, since June 1990, and intends Modesto to be his permanent residence. Previously, he resided in Modesto from January 1982 until January 1988. (Tr. 889, 939; McMurray Ex. 2, P. 2.)

66. McMurray has been involved in the following organizations, both personally and through his radio stations: Modesto Chamber of Commerce from 1982 until 1985, member of the Business Development Committee at the Chamber for one year in 1984 and was also a member of the Transportation Committee; his business was also a member of the Turlock Chamber of Commerce from 1982 until 1985; he has served on the Modesto Downtown Revitalization Committee; in 1985, McMurray was a committee member for "Kids on the Block," an educational program for young children in schools. Between 1982 and 1985, McMurray, through his radio station, helped raise money for community organizations such as the Stanislaus County Chapter of the American Heart Association, the Stanislaus County Chapter of the American Cancer Association, and the Childrens' and Womens' Crisis Center (located in Modesto), the Riverbank Chamber of Commerce, Riverbank Wine and Cheese Festival and the Manteca Pumpkin Festival. He also helped create a broadcast scholarship at Cal-State Stanislaus for minority students through visitation and financial support. (Tr. 938-939; McMurray Ex. 2, pp. 3-4.)

67. Mr. McMurray worked at WSAL, Loganport, Indiana, from 1968 until 1970 as an on-air personality. Beginning in 1970, he was employed at KLMR, Lamar, Colorado, first as an account executive for approximately 15 months and then as sales manager for 14 months. In February 1973, he left KLMR and worked as general manager of KSIL, Silver City, New Mexico, until 1976. He served as general manager at KATO(AM), Safford, Arizona, off and on from 1976 until 1982 and from 1988 until June 1990. He also served as general manager of KXKQ-FM, Safford, Arizona, from 1979 until 1982 and from 1988 until 1990. He was employed as general manager of KCEY and KMIX(FM), Turlock, California, from 1982 until 1985 and from 1985 until 1987 worked as general manager of KTMS and KHTY(FM), Santa Barbara, California.[6] (McMurray Ex. 2, pp. 2-3.)

Consulting Agreements and Covenant Not to Compete

68. Until June 8, 1990, Mr. McMurray was 100 percent owner, president, director and general manager of P&M Broadcasting, Inc. (P&M), licensee of Stations KATO and KXKQ(FM), Safford, Arizona, which is located about 900 miles from Modesto. (Tr. 907). When McMurray transferred control of P&M pursuant to the divestiture commitment contained in his Modesto application, he agreed as part of the sale of the stations to provide consulting services to the purchaser of those stations for 35 months after closing. (McMurray Ex. 1, McMurray Ex. 2, p. 1; Ayala Ex. 7.) The sales agreement provided that "Buyers agree to pay Harry S. McMurray a $35,000.00 consulting fee. This fee shall be paid at the rate of $1,000 per month for 35 consecutive months. According to McMurray, the services he provides may be by telephone, although the agreement is silent on this point. (Tr. 907.) While the stations have not employed much of Mr. McMurray's services thus far, they do have a right to them. (Tr. 911.) He provided consulting services over the phone when the sales manager called and asked him to assist her in contacting KTAR to set up football broadcasts; this discussion occupied only five to ten minutes. (Tr. 910, 969.) If P&M Broadcasting required McMurray's monthly consulting services to be performed in Safford, Arizona, where the stations are located, it would take at least two days of travel time (one day each way). (Tr. 907.)

69. Harry McMurray was previously a 50 percent owner of FMW Broadcasting, Inc., licensee of Stations KCEY(AM) and KMIX(FM), Turlock, California, located in Stanislaus County. On July 31, 1985, Mr. McMurray and the other 50 percent owner, Mr. Fenton, signed an Agreement to sell KCEY and KMIX to Radio Associates, Inc. (Associates) whose principals include Kenneth Miller, president, and Robert Salmon, vice-president. (Tr. 913-916, 1553; Ayala Ex. 8.) In Article IX, the Agreement of Sale included a non-competition provision, as follows:

> [FMW] . . . and its officers, directors and shareholders agree that they shall not, either directly or indirectly, carry on or engage in any business that is similar to the business being sold by him to Buyer pursuant to this Contract that has as its principal place of business an area, herein called "said area," consisting of the Counties of Stanislaus, Merced, San Joaquin, Tuolumne, Calaveras, and Mariposa, for so long, but not exceeding a period of eight (8) years from the date of this contract, as Buyer or any person deriving title to said business from Buyer carries on said business or a like business in said area.
>
> (Ayala Ex. 8, p. 15.)

In consideration for that forbearance, Associates agreed to pay to FMW the sum of $250,000.00, plus interest, on an installment basis over the eight-year period of the non-competition agreement. (Ayala Ex. 8, p. 4.) The non-competition agreement provided that the remedies for breach of the agreement would include injunctive relief. (Ayala Ex. 8, p. 16.)

70. In 1987, McMurray became interested in acquiring a broadcast station in or near Manteca, California, north of Modesto, and he contacted the principals of Associates regarding a possible modification of the non-competition

agreement. (Tr. 922, 1556-1557.) At that time, the parties discussed an arrangement under which McMurray would be permitted to own and operate a radio station in the Manteca area, in exchange for McMurray's forgiveness of further payments by Associates under the non-competition agreement and McMurray's promise not to present a so-called "country-and-western" music format on the Manteca station to be acquired. (Tr. 1556.) According to McMurray, an agreement to modify the non-competition agreement was struck at that time. (Tr. 921-922, 943.) However, no consideration of any kind was paid by McMurray to secure a modification of the agreement at that time. (Tr. 930-932.) According to Miller, after the initial discussions with McMurray regarding the matter, "nothing further was ever done." (Tr. 1556.) No written memorandum of the 1987 discussion exists. (Tr. 925.) No written agreement was executed at that time because "the matter died for inertia" and "the deal was just never struck, never got to the point where a further written agreement between Radio Associates and Mr. McMurray were [*sic*] necessary." (Tr. 1558.) Associates continued to make payments to McMurray after the 1987 discussions "[b]ecause there was no change in the [non-competition] agreement," only a discussion regarding a change in the agreement. (Tr. 1564.)

71. Thereafter, Miller became aware that McMurray was planning to apply to the Commission for an authorization for a new FM broadcast station in Modesto. The matter of the non-competition agreement was not addressed by Associates at the time of the filing of McMurray's application in this proceeding, because "nothing was going to go much beyond this point until some kind of agreement was executed." (Tr. 1569.)

Diversification

72. McMurray has no ownership interest in any medium of mass communications. He has pledged, in a timely fashion, to divest any such interest. (McMurray Ex. 1, p. 1.)

Auxiliary Power

73. McMurray will install auxiliary power generators at both the studio and transmitter locations of his proposed station. (McMurray Ex. 3, p. 1.)

MODESTO COMMUNICATIONS CORPORATION (MCC)

Structure and Integration

74. MCC is a California corporation. There are two authorized classes of common stock of MCC, a voting class and a non-voting class, with one hundred shares of each class of stock issued and outstanding. The ownership of the stock of MCC is as follows:

Elmer M. Gunkel	50 shares voting
Phyllis B. Gunkel	50 shares voting
Edward J. Cardoza and Dolores M. Cardoza, as community property	100 shares non-voting

75. Elmer Gunkel is the Chairman of the Board of Directors and the President of MCC. His wife Phyllis is a director, the Secretary, and the Chief Financial Officer of MCC. Neither Edward Cardoza, nor his wife Dolores, holds any position as a director or an officer of MCC. William H. Gunkel, the brother of Elmer Gunkel, is a director, but has no stock interest. (MCC Ex. 1, p. 1.) Elmer Gunkel first heard about the availability of a station in Modesto in 1984. (Tr. 623.) Over the next few years, he discussed the station's availability with a few individuals, including Edward Cardoza. (Tr. 624, 707, 710.) When Elmer Gunkel heard that the FCC had opened a filing window for Modesto, he again spoke with Edward Cardoza about joining him to file an application. Elmer Gunkel met with Edward Cardoza about forming a corporation. Mrs. Gunkel was not present at the meeting. (Tr. 624-625, 679, 711.) Prior to filing MCC's application, Mrs. Gunkel never spoke with either Mr. or Mrs. Cardoza about preparing or filing a Modesto application or forming a corporation. (Tr. 677-679.)

76. Elmer Gunkel and Edward Cardoza have been friends for over 20 years. (Tr. 618, 706-707, 717.) Elmer Gunkel and Edward Cardoza were previously involved in an unsuccessful business venture involving the sale of food products. (Tr. 619-620, 692, 718.) Elmer Gunkel put together MCC's proposed budget with the assistance of counsel. Mr. Gunkel also consulted Roger Turnbeaugh, general manager of a station in Lodi, California, who provided Gunkel with some information. (Tr. 630, 649.) Phyllis Gunkel did not assist in the preparation of the station's proposed budget for construction and initial operation. (Tr. 683, 696-697.) Elmer Gunkel prepared the MCC application with the assistance of counsel. He signed the application. (Tr. 633-635, 652.) He contacted Edward Cardoza to obtain a financial commitment. (Tr. 650-651.) Phyllis Gunkel's involvement in obtaining financing was limited to knowing how much she and Elmer had committed to spend. (Tr. 651.)

77. MCC proposes to integrate both Elmer M. Gunkel and Phyllis B. Gunkel into full-time day-to-day management and operation of the Modesto station on a minimum 40 hour per week, daily basis. Elmer Gunkel proposes to occupy the position of general manager at the Modesto station. Phyllis Gunkel proposes to occupy the position of business manager. (MCC Ex. 3, p. 1, MCC Ex. 4, p. 1.) Elmer Gunkel made the decision regarding the positions he and his wife would occupy. (Tr. 662-663.)

78. As general manager, Elmer Gunkel's duties will encompass all aspects of station operations, including, but not limited to, establishing corporate policy and procedures, oversight, and supervision of the station, the hiring, firing, and promotion of employees, supervision of programming, sales, promotion, engineering, legal compliance, interface with legal and engineering counsel, and the general representation of the station before the community. (MCC Ex. 3, p. 1.)

79. Elmer Gunkel is currently employed as manager of Manteca Trailer and Camper Sales but will terminate that employment if MCC is awarded a construction permit so that he can devote his full time to his duties at the station. Mr. Gunkel will also curtail any of his other activities to the extent required in order for him to devote his full time to the operation of the station. (Tr. 609; MCC Ex. 3, p. 1.)

80. Phyllis Gunkel's duties as the business manager will encompass all business and financial aspects of station operations, including, but not limited to, establishing corporate policy and procedures in connection with the financial operation of the company, accounting functions, budgeting, and related financial matters. (Tr. 683; MCC

Ex. 4, p. 1.) Mrs. Gunkel has no accounting background. She further had no idea how large her staff would be. (Tr. 683-684.)

81. Phyllis Gunkel has been retired since 1988. She will curtail any of her other activities to the extent required in order for her to devote her full time to the performance of her duties as Business Manager. (Tr. 672; MCC Ex. 4, p. 1.)

82. Elmer and Phyllis Gunkel previously were residents of Modesto from 1950 to 1951 and again from 1957 to 1960. Thus, they have not resided in Modesto or the surrounding 1 mV/M service area for over 30 years. Mr. and Mrs. Gunkel presently reside in Manteca, California, and have done so for the past decade. Mr. and Mrs. Gunkel propose to move to Modesto if the Commission grants MCC's application. However, they do not intend to sell their house in Manteca. (Tr. 595, 611-612, 663, 668; MCC Ex. 3, p. 2; MCC Ex. 4, pp. 1-2.) Elmer Gunkel previously commuted from Manteca to Modesto when he worked at KTRB(AM) in 1984. (Tr. 617.)

83. Phyllis Gunkel is a non-minority female. Elmer Gunkel is a non-minority male who has the following broadcast experience: 1950-1955, part-time position as on-air personality at Stations KSTN(AM) and KXOB(AM), Stockton, California; 1961-1963, on-air personality and sales manager at Stations KCVR and KCVR-FM, Lodi, California; 1963, sales manager at Station KVEG(AM), Las Vegas, Nevada; 1963, sales representative at Station KSTN(AM), Stockton, California; 1963-1964, on-air personality and sales manager at Station KUNE(AM), Reno, Nevada; 1967-1970, on-air personality and sales representative at Station KLOC(AM), Modesto, California; 1980-1983, on-air personality and sales representative at Station KQKK-FM, Manteca, California; 1984, sales representative at Station KTRB(AM), Modesto, California. Mr. Gunkel admitted that he has never managed a broadcast station previously. (Tr. 662.)

84. Edward Cardoza views himself as an investor in this broadcast venture. (Tr. 711, 724.) However, there is a differing view of how much money Edward Cardoza had invested in MCC. According to Mr. Cardoza and Mr. Gunkel, Mr. Cardoza paid in a total of $10,000 to the corporation. (Tr. 658-660, 711-712.) Mrs. Gunkel, on the other hand, believes that Mr. Cardoza loaned $10,000 to MCC and also paid an additional $5,000 for his stock. (Tr. 686.)

Diversification

85. Neither MCC, nor any person holding an interest in MCC or any member of such person's immediate family, holds any interest in any medium of mass communications. (MCC Ex. 2, p. 1.)

Auxiliary Power

86. MCC will install auxiliary power generators at both its transmitter and studio locations. (MCC Ex. 5, p. 1.)

BCD LIMITED PARTNERSHIP (BCD)

Structure and Integration

87. BCD is a limited partnership created under the laws of the State of California. The partnership is composed of one general partner, Salvador H. Campos, who has the sole voting rights and 33 1/3 percent of the equity of the partnership, and two limited partners, Amador S. Bustos and Carlos Duharte, each having 33 1/3 percent of the equity of the partnership. (BCD Ex. 1, p. 1.)

88. Mr. Campos, Mr. Bustos, and Mr. Duharte are business colleagues who had previously talked in general terms about joining together in a business venture. (BCD Ex. 8, p. 7.) In January or early February 1988, Mr. Bustos became aware of a new FM radio allotment in Modesto. He learned this from a newsletter that he had received from his communications counsel, the law firm of Fisher, Wayland, Cooper & Leader (Fisher, Wayland). Bustos considered applying individually, but elected instead to file as a part of a group. (BCD Ex. 8, pp. 5-7.)

89. Bustos originally contacted Duharte about applying for the authorization. Thereafter, Campos was approached about applying for the Modesto station authorization by Duharte and Bustos, who called Campos into a meeting that they were having to discuss the possibility of applying. (Tr. 1278; BCD Ex. 8, p. 7.) Bustos and Duharte had both previously filed applications with the Commission for broadcast station construction permits. (Tr. 1279.) Bustos has previously applied for or acquired radio stations as a partner in a partnership. In all previous instances, Bustos has been a general partner. (BCD Ex. 8, p. 15.) The BCD application was Campos' first experience as a participant in a broadcast application. (Tr. 1279.)

90. Bustos and Campos travelled together to Modesto to look for possible antenna tower sites and, while there, contacted a site owner. (Tr. 1281; BCD Ex. 8, pp. 8-9.) After the trip to Modesto, the three men discussed the steps that were necessary to go forward. (BCD Ex. 8, p. 12.) They decided to use the name "BCD" which stands for "Bustos, Campos, Duharte." (Tr. 1313.) Mr. Bustos mentioned the name of a consulting engineer, Mr. Cuellar, who speaks Spanish. When Mr. Campos inquired about a law firm that Mr. Bustos had used, Mr. Bustos provided the name of the lawyer he had dealt with in Washington, Richard Zaragosa of the firm Fisher, Wayland, Cooper and Leader. (Tr. 1284, 1288-1289; BCD Ex. 8, p. 14.) Mr. Campos called Mr. Cuellar and retained him to do the engineering. (Tr. 1288.)

91. With regard to the site, on February 24, 1988, Cuellar wrote to BCD's counsel, transmitting an engineering report regarding the station to be proposed by BCD in its application. In the letter, Cuellar made the suggestion that "[i]f Amador could find a site about two miles to the north or northeast, he could very well add another 40,000 or so in population to the 1 mV/m contour, but he would have to add another 54 or more meters to the Height of the Antenna Radiation Center above average terrain." (Jones Ex. 6.) The "Amador" in the letter refers to Bustos. (Tr. 1292.) The letter indicates that a copy was provided to Campos. (Jones Ex. 6.) BCD did not amend to a new site.

92. Campos had not previously filed an FCC application and prior to the filing of the application, he relied on the past experience of Bustos. Bustos counseled Campos on obtaining financing for the construction and operation of BCD's proposed station. (Tr. 1296-1297.) Bustos suggested to Campos that CVC Capital Management Corporation (CVC), with whom Bustos had done business in the past, be contacted for the purpose of obtaining a loan commitment for the Modesto station. (BCD Ex. 8, p. 31.) CVC provided BCD with a letter regarding financing the construction of the Modesto station. (Tr. 1350.) Bustos also discussed with Campos what kind of information CVC would likely require. (BCD Ex. 8, p. 34.)

93. Campos and Bustos prepared the budget for the proposed station from a model budget which Bustos had prepared and used in one of his other broadcast applications and which he had retained in his personal computer. (Tr. 1297; BCD Ex. 8, p. 27.) Very minimal changes were made in the budget provided by Bustos. (Tr. 1298-1299.) According to Bustos, changes might have been made in the figures listed on the sample budget provided by him to Campos, but Bustos could not recall any specific changes made by Campos to any line item. (BCD Ex. 8, p. 30.) In connection with the preparation of the budget, Campos did not personally contact any equipment manufacturers or suppliers, nor did he get any prices on antennas, transmitters, or modulators. He contacted an engineer at FM broadcast station KBRG in Fremont, California, in order to inquire about the cost of studio equipment. (Tr. 1344-1346.) Campos discussed with Bustos the size of the staff that would be needed to operate BCD's proposed station. (BCD Ex. 8, pp. 26-27.)

94. Bustos and Campos worked on a business plan for BCD's proposed station. The basis for the business plan was a sample plan that Bustos had used in his other broadcast applications and which he had retained in his personal computer. (Tr. 1321; BCD Ex. 8, pp. 38-39.) According to Campos, he and Bustos had "about the same" level of input of ideas into the business plan. (Tr. 1322-1324.) But at his deposition, Campos testified that he had a greater input than Bustos. (Tr. 1324.)

95. Sometime after mid-February 1988, the three men discussed and decided to form the applicant as a limited partnership. Bustos, using his computer, typed up a limited partnership agreement, and a copy of the draft was sent to Fisher, Wayland. Counsel reviewed the agreement with Campos and suggested some changes. The changes were made on Mr. Bustos' computer, and the agreement was then sent back to counsel for review and ultimately signed on February 29, 1988. (Tr. 1304-1306; BCD Ex. 8, p. 16.)

96. Mr. Campos obtained the FCC Form 301 application from FCC counsel, and he filled out the form and sent it back to counsel to be typed. Counsel sent the form back to Mr. Campos for review and signature. He was the only person to participate in filling out the 301 Form, although Bustos and Campos had discussed possible formats for BCD's proposed station with Duharte. (Tr. 1308-1309; BCD Ex. 8, p. 26.) The check to the FCC for the initial filing fee was written out of Mr. Campos' personal account, and the two limited partners each paid him their share. (Tr. 1331.) Mr. Campos, Mr. Bustos, and Mr. Duharte each made the initial $2,000 contribution required by the Limited Partnership Agreement, and Mr. Campos established a bank account for BCD. (Tr. 1327-1328; BCD Ex. 1, p. 18.) At the time of the hearing, each of the partners had contributed close to $15,000. (Tr. 1329.)

97. Article 9 of BCD's Limited Partnership Agreement provided that "The General Partner shall have the right to exercise full and exclusive discretion in the management and control of the affairs of the Limited Partnership." (BCD Ex. 1, pp. 8-10.) Article 10 of BCD's Limited Partnership Agreement provides that:

> No Limited Partner shall participate in the management of the business of, or transact any business for, the Limited Partnership. The Limited Partners shall be solely passive investors, and shall have no decision making or voting power that may in any way influence the General Partner's decisions concerning the day-to-day business of the Partnership. The Limited Partners shall not serve as an employee, independent contractor or consultant to the Partnership. The Limited Partners will provide no services to the Partnership, provided however, that making loans to the Partnership or acting as a surety for Partnership debts shall not be considered to be the provision of services.
>
> (BCD Ex. 1, pp. 10-11.)

98. Mr. Campos keeps the files of papers associated with BCD's application in his office and neither Mr. Bustos nor Mr. Duharte has a copy. (Tr. 1295.) Mr. Campos took care of establishing the public file and newspaper publications. Mr. Bustos had no conversations with Mr. Campos about where to place the file, or the content of the newspaper notice, and never saw copies of the newspaper publication. (BCD Ex. 8, pp. 52-53.) Mr. Bustos did not see the Integration and Diversification Statement and does not know the identity of the applicants competing against BCD. (BCD Ex. 8, pp. 54-56.) He stated that Mr. Campos could decide on his own to dismiss BCD's application. (BCD Ex. 8, p. 57.)

99. On July 14, 1989, BCD filed an Amendment, dated June 29, 1989, to its application to report the current media interests of its limited partner Amador S. Bustos and his wife Rosalie L. Bustos. (MCC Ex. 6.) The Amendment was written and signed by Mr. Bustos, at the request of BCD's general partner, Mr. Campos, because the Amendment related solely to Mr. Bustos' media interests. Mr. Campos did not know the extent of Mr. Bustos' media interests and believed Mr. Bustos was best qualified to certify what they were. At no other time has Mr. Bustos amended or attempted to amend BCD's application. (BCD Ex. 9.)

100. Salvador H. Campos, a Hispanic male, is the sole general partner of BCD. He will serve full-time (40 or more hours per week) as general manager of BCD's Modesto station. His responsibilities will encompass policy formulation and management of day-to-day station affairs, including but not limited to, the development of programming, sales, and financial policies, the hiring and firing of station personnel, and the supervision of all managerial personnel. He will also be responsible for formulating and implementing the station's business plan and overseeing financial operations, including billing, accounting, collections, and payroll. In addition, Mr. Campos will be in charge of the station's Equal Employment Opportunity program and will supervise the station's ascertainment process and the development of programs to meet community problems, needs and interests. At the present time, Mr. Campos is the Program Director at Station KBRG(FM), Fremont, California, but in the event that BCD's application is granted, he will withdraw fully from this position and any other business interests that might require his time and attention, in order to work full-time at the Modesto station. (BCD Ex. 2, p. 1.)

101. Mr. Campos presently resides in Fremont, California. He has never resided in Modesto, California, or the proposed service area. In the event that the Modesto application is granted, Mr. Campos will move to and establish a permanent residence in Modesto, California, prior to the commencement of program test authority. (BCD Ex. 2, p. 2.)

102. Salvador Campos began his broadcasting career in 1972 as an announcer at Station KBRG-FM, San Francisco, California, and subsequently became the News Director and the Production Manager at that station. He remained at this station until the latter part of 1980. In early 1981, Mr. Campos worked for a short period of time at Station KAZA-AM, Gilroy, California, where he was an announcer during afternoon drive time. In approximately April 1981, he commenced employment as an announcer at Station KDDS-FM, Fremont, California (the station subsequently changed its call letters to KBRG-FM). For approximately ten years, he has been the Program Director at KBRG-FM. (BCD Ex. 2, pp. 2-3.)

Diversification

103. Neither BCD nor its general partner, Salvador Campos, has any ownership interest in any medium of mass communications. Amador S. Bustos, a limited partner in BCD, owns, with his wife Rosalie, 31.66 percent of Coyote Communications, Inc., permittee of Station KSQQ(FM) (formerly KRAC-FM), Channel 241A, Morgan Hill, California. Mr. Bustos is also president and director of Coyote. (BCD Ex. 1, p. 1, BCD Ex. 8, p. 45.) Mr. and Mrs. Bustos also own a one-third general partnership interest in a new FM station on Channel 295A at Los Banos, California. (*See*, "Petition for Leave to Amend" filed April 2, 1991, and accepted by *Order* of the Presiding Judge (FCC 91M-1360), released April 18, 1991.

Auxiliary Power

104. BCD will install auxiliary power sources at the proposed Modesto station's transmitter site and main studio. (BCD Ex. 3.)

THOM REINSTEIN COMMUNICATIONS, CALIFORNIA LIMITED PARTNERSHIP (Reinstein)

Structure and Integration

105. Reinstein is a limited partnership formed on February 24, 1988. The sole general partner, Thom Reinstein, holds a 50 percent equity interest in the applicant and the sole limited partner, Allen Thomsen, holds the remaining 50 percent equity interest. (Reinstein Ex. 1.) Mr. Thomsen is Mr. Reinstein's brother-in-law. (Tr. 1488.) The Partnership Agreement provides that the partners shall receive their equity interests in exchange for (i) providing services to the partnership, in the case of the general partner, and (ii) furnishing all of the funding for the partnership's activities, in the case of the limited partner.[7] With the exception of some expenses paid by Reinstein in connection with a deposition session that was held in Modesto in June 1990, all of Reinstein's expenses have been paid by Thomsen. Reinstein has contributed no other money to the partnership. (Tr. 1472-1473, 1487, 1508, 1537-1540.) The Reinstein Limited Partnership Agreement further prohibits the limited partner from:

> (1) Participating in the control or management of the partnership business;
>
> (2) Having the power to bind the partnership in any contract, agreement, or undertaking;
>
> (3) Serving as an employee, agent or independent contractor;
>
> (4) Serving as a general partner or as an officer or director;
>
> (5) Consulting with or advising the general partner with respect to the partnership business.
>
> (Reinstein Ex. 1.)

106. Mr. Reinstein learned of the availability of the Modesto channel from a newspaper advertisement placed by Consolidated Broadcasting Company. (Tr. 1436, 1468, 1491.) Reinstein called Roy Giles of that company to obtain more information. (Tr. 1492.) Mr. Reinstein felt that he required financial backing in order to apply for the channel. He asked his brother-in-law and long-time family friend, Allen Thomsen, if he would be interested in providing the financial backing. (Tr. 1469.) Mr. Thomsen is a farmer and resides in Firebaugh, California. With his brothers, he farms 8,000 acres of tomatoes, cotton, alfalfa, and lima beans. Mr. Thomsen has no experience in broadcasting. He agreed to participate as an investor and to fund the proposal. (Tr. 1527-1529, 1537, 1546.)

107. Reinstein hired Consolidated to prepare the application. Reinstein and Thomsen had discussed the hiring of Consolidated, and the decision to hire Consolidated was made jointly by Thomsen and Reinstein. (Tr. 1469.) Consolidated's fee included initial services of counsel and a consulting engineer. (Tr. 1467, 1492, 1494.) Working with Consolidated, communications counsel and the consulting engineer, Mr. Reinstein prepared the application. Mr. Reinstein prepared a budget based on a model budget provided by Consolidated. (Tr. 1467-1468, 1494.) He obtained the transmitter site. (Tr. 1496, 1512, 1518.) He drafted the program service statement, gathered data for the EEO program, set up the public inspection file, and published the required notices which had been prepared by counsel. (Tr. 1511-1513, 1518-1519.) Mr. Reinstein reviewed the budget with Mr. Thomsen to apprise him of the amount necessary to fund the application. Consolidated furnished Reinstein with a sample integration statement. (Tr. 1495.) To provide Mr. Reinstein with documentation of his ability to provide these funds, Mr. Thomsen secured a letter from his bank stating its willingness to loan Mr. Thomsen the necessary amount. Mr. Thomsen then agreed to loan the funds to the partnership. (Tr. 1470-1473, 1537-1538.) The principals, working with Thomsen's counsel, mutually decided to form a limited partnership with a 50-50 division of equity. (Tr. 1488, 1533-1537.)

108. Thomsen paid the fee to Consolidated Broadcast Services. He reimbursed Mr. Reinstein for the FCC filing fee and for the hearing fee. Thomsen was not involved in preparing the 301 application, but he did recall reviewing the application. He has also given Mr. Reinstein his comments on the kind of music he likes and what kind of format appeals to him. (Tr. 1532-1533.) Mr. Reinstein showed Mr. Thomsen the tower site after the application was filed. (Tr. 1539.)

109. Mr. Reinstein is a white male. He resides at 2004 Bridger Drive, Modesto, California. Mr. Reinstein has continuously resided in Modesto since March 1982. (Reinstein Ex. 2, p. 3.)

110. If Reinstein's application is granted, Mr. Reinstein will be integrated into the station's day-to-day management and operations as the General Manager. Mr. Reinstein will devote, at minimum, 40 hours per week to his duties as general manager including supervising all station oper-

ations; developing overall station policies relating to sales, finances, programming, and personnel; implementing the station's equal opportunity program; and, being responsible for all station employee hiring and firing. (Reinstein Ex. 2, p. 1.)

111. Mr. Reinstein is the founder and 100 percent owner of Thom Reinstein Productions (TRP), a sole proprietorship, which produces "Portraits in Sound," a nationally-syndicated two-hour per week radio program. (Tr. 1474; Reinstein Ex. 2, p. 1.) Up until January 1988, TRP produced "Portraits in Sound," sold commercial matter in the program, marketed the program to radio stations, and scheduled advertising. (Tr. 1435.) Since January 1988, rights to "Portraits in Sound" have been licensed to Radio Today Entertainment (Radio Today), a New York company, which has the exclusive right to sell the commercial matter contained in the program, market the program to radio stations, schedule all advertising, and determine on which stations the program is placed nationwide. (Reinstein Ex. 2, pp. 1-2.) The arrangement with Radio Today is based on a month-to-month agreement. (Tr. 1436.) Radio Today sends Mr. Reinstein all the spots he needs on a weekly basis, and he includes the spots in the programming. While Radio Today has the exclusive right to determine the stations on which the program is placed, Mr. Reinstein has recommended stations to Radio Today. (Tr. 1438-1440.)[8]

112. TRP has, in the past, produced custom spot packages, custom musical jingles, and radio station identification packages and, since 1986, has produced a handful of custom spots and musical jingles each year. These are created for local ad agencies and played on local stations. (Tr. 1433- 1434.) During the nine months of 1990, preceding the hearing, Mr. Reinstein sold two to three custom spots and had produced a couple of custom jingle packages. TRP will cease producing this material, and only produce "Portraits in Sound" if awarded the permit. TRP is Mr. Reinstein's only present occupation and has been since 1984. At the time of the hearing, it was his sole source of compensation. (Tr. 1448.)

113. If Reinstein is awarded the construction permit for Modesto, he will continue to own and operate TRP. (Tr. 1442.) However, Reinstein has made arrangements to turn over all production responsibilities, i.e., producing the master tape by blending music and commercials, to Pacific Media Group, a company with a full production facility. Mr. Reinstein has an oral understanding with Ken McCall, the owner of Pacific Media, regarding this arrangement. (Tr. 1460-1461.) A letter from Mr. McCall to Reinstein regarding their understanding was transmitted prior to the hearing. (Tr. 1442-1444.) Mr. Reinstein also intends for the day-to-day management of TRP to be handled by an employee. (Reinstein Ex. 2, pp. 2-3.) However, Reinstein conceded that he has no employees currently, and he has no one in mind for this task. (Tr. 1445.) The proposed employee would be dealing as an intermediary with Pacific Media and would report back to Mr. Reinstein. Mr. Reinstein would have to oversee or manage the employee. (Tr. 1457, 1459.) TRP, as noted, will cease producing material other than "Portraits in Sound."

114. Mr. Reinstein acknowledged that Radio Today would want him to remain in control of the content of "Portraits in Sound" and would want the program under his supervision as host. He will continue to select the music and to do the voice-overs even after the responsibilities for production are turned over to Pacific Media because he is the host of the program. (Tr. 1446-1447.) Thus, Mr. Reinstein will personally continue to select all music for "Portraits in Sound." He will continue to audition records to find out what he wants to include in the program. This involves listening to approximately a dozen compact discs which he receives each week. (Tr. 1485-1486.) He has personally arranged for interviews with recording artists through their managers or record companies and conducts such interviews by telephone. Mr. Reinstein will continue to arrange such interviews. When the artist sends back the tape of the interview, which is about 10 to 15 minutes in length, Mr. Reinstein cuts the interview up into severable usable segments which he keeps in his library. (Tr. 1453-1456, 1484.) He maintains a card file based on his auditioning which he updates. (Tr. 1519-1520.) Mr. Reinstein provides a cue sheet to send out with the program, and he will continue to provide this. (Tr. 1477-1478, 1520.)

115. If Reinstein is awarded the construction permit, he will spend a maximum of five hours per week in an oversight and supervisory capacity at TRP which will include selecting the music, taping the brief comments, and conducting interviews. (Reinstein Ex. 2, p. 3.) This material will be taken to Pacific Media, who will produce the program. (Tr. 1451-1452.) While Reinstein presently spends about 30 hours a week at the office on work relating to TRP, such as opening mail, paying bills, answering the telephone, talking to record companies, he does not do very much during the 30 hours. (Tr. 1522-1523.) The actual taping of the two-hour weekly program, which is all ad lib, is on real time and does not include preparation time. (Tr. 1459-1460.) It now takes Reinstein a total of about three hours to produce an episode of the program. (Tr. 1451-1452.)

116. From October 1981 to September 1984, Mr. Reinstein was employed at KFIV-FM, Modesto, as music director and assistant to the program director. He also did an air shift. From February 1982 to March 1982, Mr. Reinstein was the Program Manager and had an air shift at KFMR-FM, Stockton, California. (Tr. 1422-1423; Reinstein Ex. 2, pp. 3-4.) Mr. Reinstein did volunteer work while he was in school as an announcer and interim program director at noncommercial educational Station KBBY-FM (formerly KSRT-FM), Tracy, California, from June 1980 to January 1981. From September 1978 to June 1980, while he was in school, Mr. Reinstein worked in various news and public affairs programming capacities at noncommercial educational Station KBPK-FM, Buena Park, California, and, as part of his curriculum, he served as the station's production director from January to June 1980. (Tr. 1424-1425; Reinstein Ex. 2, p. 4.) Mr. Reinstein received an A.A. Degree in Radio and TV Broadcasting from Fullerton College, Fullerton, California, in 1980. He received an FCC Third Class Operator's Permit in 1979. (Tr. 1423-1425; Reinstein Ex. 2, pp. 3-4.)

117. Thom Reinstein has been a resident of Modesto, California, within the 3.16 mV/m contour of the proposed station, since 1982. (Reinstein Ex. 2, p. 3.) Since March 1990, Reinstein has been a member of the Board of Directors of Community Transitional Resources, Modesto, an organization providing housing and support services for mentally ill adults in the area. From January to March 1990, he assisted in the production and presentation of a video for Modesto City Schools Alternative Program. Since November 1989, he has served as the Chief Executive Officer and Director of Stanislaus County Homeless Coali-

tion, and he previously served the organization as media chairperson. (Reinstein Ex. 2, pp. 4-5.) In approximately June 1988, Mr. Reinstein coordinated entertainment for the Modesto Ala Carte Festival by contacting several musical acts. (Tr. 1431, 1503-1504; Reinstein Ex. 2, 5.) Mr. Reinstein participated in the annual Muscular Dystrophy Association's Skate-a-thon in Modesto in 1984 while employed by KFIV, but his participation was for only several hours on one Saturday afternoon and was not meaningful. (Tr. 1431, 1504; Reinstein Ex. 2, p. 5.) In 1983, Mr. Reinstein volunteered in the Modesto Annual Coke-a-thon to raise funds and encourage community involvement in United Cerebral Palsy Association or the Muscular Dystrophy Association. (Tr. 1431-1432, 1501-1502; Reinstein Ex. 2, 5.) Mr. Reinstein has been a member of Calvary Chapel Community Church in Modesto since July 1987, and has served as a youth leader, produced a praise and worship album, and participated in a musical group. (Tr. 1489; Reinstein Ex. 2, p. 5.)

Diversification

118. Neither Thom Reinstein Communications Limited nor Allen Thomsen has any interest in any medium of mass communications. (Reinstein Ex. 3.) As previously noted, Thom Reinstein is the 100 percent owner and operator of Thom Reinstein Productions (TRP), which produces "Portraits in Sound," a nationally syndicated two-hour per week radio program and also produces custom spot packages, custom musical jingles, and radio station identification packages. (Reinstein Ex. 2, p. 1.) "Portraits in Sound" is syndicated by Radio Today Entertainment, the largest independent syndicator in the country. (Tr. 1434, 1437.) The program is carried on approximately 80 affiliates nationwide. It is currently carried on Station KOSO(FM), Patterson, California, near Modesto, and was previously carried on KDJK-FM, Oakdale. The program is also carried on other stations in California. (Tr. 1440-1442.)

Auxiliary Power

119. Reinstein will employ use of auxiliary power generators at both its transmitter and studio sites. (Reinstein Ex. 4.)

PAMELA R. JONES (Jones)

Structure and Integration

120. Ms. Jones is a sole proprietor. Ms. Jones is not proposing any integration. (Tr. 1670.)

Diversification

121. Ms. Jones holds no interest in or connection with any medium of mass communications. (Jones Ex. 1.)

Auxiliary Power

122. Ms. Jones proposes use of auxiliary power at her studio and transmitter site to assure continued operation in the case of commercial power failure. (Jones Ex. 4.)

Financial Issue

123. The financial issue was added against Jones because she had filed numerous applications within a short period of time. Jones had filed 12 applications in her name since 1988 and a 13th application as a 49 percent partner with her attorney, Michael J. Wilhelm. Ms. Jones' applications, in order of their filing, are as follows:

(1) Modesto, California (File No. BPH-880301OY)

(2) Carlsbad, New Mexico (File No. BPH-880323MK) – in partnership with Michael J. Wilhelm)

(3) Fort Wayne, Indiana (File No. BPH-880421MR)

(4) Olathe, Kansas (File No. BPH-880421NK)

(5) Macon, Georgia (File No. BPH-880421NL)

(6) Virginia Beach, Virginia (File No. BPH-880505NR)

(7) Roanoke, Virginia (File No. BPH-880602OL)

(8) Bixby, Oklahoma (File No. BPH-880602OK)

(9) Ellettsville, Indiana (File No. BPH-880725ML)

(10) Brownsburg, Indiana (File No. BPH-880725MF)

(11) Homewood, Alabama (File No. BPH-880811MJ)

(12) Lexington, Kentucky (File No. BPH-880811MG)

(13) Bethalto, Illinois (File No. BPH-880811MP)

(Jones Ex. 3, Attachment C, p. 3.)

Subsequent to the filing of the Modesto application, she voluntarily dismissed her application for Nags Head, North Carolina (File No. BPH-861014TA). (*Id.*)

124. Jones was aware of the Commission's financial requirements at the time she filed her Modesto application. (Jones Ex. 2, pp. 2-3.) Jones requested and received from her counsel preliminary detailed estimates of construction and operating costs for each market for which she planned to apply. She believed that her counsel was qualified to provide those cost estimates because he had broadcast experience and was a consulting engineer and communications attorney. (Tr. 1733, 1735, 1780, 1795; Jones Exs. 2, p. 4; Jones Ex. 2, Attachments E-R.) Jones estimated that it would cost $1,334,403 for the capital and first three months operating expenses for her six initial stations (including Modesto).

125. According to Jones, her financial certification to each of her proposals is based on an understanding with Mr. H. Loy Anderson, President of the Florida National Bank, which they reached prior to the filing of her applications. Anderson is a personal friend and business associate of Ms. Jones and Mr. Wilhelm. Mr. Anderson previously participated with Ms. Jones in her "consulting" work for a Tequesta, Florida, applicant which resulted in a settlement whereby Jones and Anderson each received $198,000. According to Jones, she had several discussions with Mr. Anderson regarding her plan to file the maximum allowable applications for new FM radio stations. (Tr. 1751-1753; Jones Ex. 2, pp. 3-4.)

126. Jones informed H. Loy Anderson, President, Florida National Bank, of her financial condition and employment in February 1988 before filing her Modesto application. She provided him with cost estimates for her various stations. However, she did not provide him with a business plan, a personal financial statement, or a loan application. She had no prior loan history with the Flor-

ida National Bank, nor did she ever have an account at that bank. (Tr. 1755-1756, 1817; Jones Ex. 2, pp. 4-5; Jones Ex. 2, Attachments E-R.)

127. On April 20, 1988, Anderson signed a letter, drafted by Jones' counsel. It stated that it provides Jones "reasonable assurance that the funds for the proposed station will be available provided that certain conditions are met. (Tr. 1778-1779; Jones Ex. 2, Attachments T, U.) The letter covers a $1,334,403 estimate for an initial six stations and invites Jones to notify the bank of the cost of each additional station she was interested in so that those stations could be added to the letter by amendment. (Tr. 1687-1688.) According to Jones, she sent Anderson additional cost estimates for proposed stations as they were prepared, but the April 1988 letter was never supplemented or amended to include the additional applications. While the April 1988 letter identifies the anticipated interest rate for the loan, it omits repayment and collateral terms. (Jones Ex. 2, 65.) According to Jones, the April 1988 letter reconfirmed the oral understanding she reached with Anderson at the end of February 1988. (Tr. 1750, 1776.) The letter further stated that "*this letter does not obligate Florida National Bank in any way and is not enforceable*." (Jones Ex. 2, Attachment T.) Jones claims to have received an earlier February 28, 1988, letter from Anderson which would "very likely" have been in connection with her Modesto application. (Jones Ex. 2, p. 5.) However, Jones could not locate the letter in her records and made no effort to secure a copy from Anderson. (Tr. 1754-1755.)

128. Ms. Jones later learned from Mr. Wilhelm that Florida National Bank changed its policy regarding contingent loan requests.[9] He instructed her to locate back-up sources of funding. She then obtained back-up letters of funding from Michael O. Vaughan of Mercantile-Safe Deposit and Trust Company (Mercantile) of Baltimore, Maryland. According to Jones, she had a long previous relationship with Mercantile and its officials and made them aware of her interest in acquiring broadcast properties. (Jones Ex. 2, pp. 6-9.) According to Jones, she showed Michael Vaughan copies of her applications as well as a summary of her cost estimates, her personal financial statement, and her correspondence with Anderson. She did not provide Vaughan with any written business plan. Later, Jones furnished detailed cost estimates to Vaughan and received letters covering eight applications from him in return. (Tr. 1815-1816, 1824-1825, 1975-1976; Jones Ex. 2, pp. 9-10. Jones Ex. 2, Attachments E-R, RR.) Jones had never borrowed money from Mercantile, had no bank accounts there, and never asked about Mercantile's lending limit. (Tr. 1816-1817.) The letters Ms. Jones obtained from Mr. Vaughan relate to her proposed stations in Bethalto, Illinois; Bixby, Oklahoma; Brownsburg, Indiana; Roanoke, Virginia; Virginia Beach, Virginia; Lexington, Kentucky; Homewood, Alabama; and Ellettsville, Indiana. Each letter states that it "is not a loan commitment and does not obligate Mercantile-Safe Deposit and Trust Company in any way." (Tr. 1813-1815; Jones Ex. 2, Attachment LL-SS.)

129. In response to a specific request from Mr. Vaughan, Jones' counsel prepared a Personal Financial Statement for Jones dated August 10, 1988. Ms. Jones conceded at the hearing that the Statement overstates her net worth because liabilities were added to assets rather than subtracted. She was not certain what period of time the Statement covered. (Tr. 1793-1794, 1811; Jones Ex. 2, Attachment JJ.) Ms. Jones has never prepared any financial statement dividing assets and liabilities into current and long term, and she has never had an audited financial statement prepared. (Tr. 2010-2011.) Ms. Jones' financial statement lists total assets of $599,000 consisting of cash of $250,000; other investments of $300,000, vested retirement assets of $10,000, other assets including personal property of $30,000 and net cash value of life insurance of $9,000. (Jones Ex. 2, Attachment JJ.) From 1988 until the hearing, she had spent about $100,000 to file and prosecute 12 applications which came out of her general assets. (Tr. 1773-1774.) However, her capital contributions for the 12 applications had been offset by the proceeds from the settlement of three of the applications (Bethalto, Fort Wayne, and Ellettsville). (Tr. 1774, 1791-1792.) The $300,000 entry for "Other Investments" in the assets column on her financial statement represented "the potential value of 12 stations operating and making money." (Tr. 1788-1789.) Each of Ms. Jones' budgets contains a line item for "Existing Capital" which represents the money she will contribute to the application. The budgets reflect that her total personal commitment is approximately $210,000, including $12,000 for the Modesto application. (Tr. 1786-1787, 1792.)

130. Ms. Jones became aware of the FM channel in Modesto when her counsel showed her a list of Docket 80-90 markets. Ms. Jones has never been to Modesto in connection with her application. Counsel prepared all cost estimates for Modesto and all other applications.

131. According to Jones, she certified her financial qualifications relying on the cost estimates prepared by her counsel and the "financial assurances" given by Anderson. (Tr. 1738, 1750, 1771, 1776.) Before certifying any application, Jones stated she reviewed her attorney's cost estimates. According to Jones, her counsel advised her that she could legally certify that she was financially qualified based on the information she had in her possession, including those communications received from the Florida National Bank and from the Mercantile-Safe Deposit and Trust Company. (Tr. 1735; Jones Ex. 2, p. 10.)

132. The bank letters obtained by Jones and upon which she was relying were not received in evidence for the truth of the matter asserted therein. Specifically, Jones was requested to produce the authors of the bank letters for cross-examination before they would be admitted to establish the facts stated therein. Jones refused to produce the bankers for cross-examination, and the Presiding Judge received the letters merely to establish Jones' state of mind. (Tr. 1701-1703.)

Reporting Issue

133. A reporting issue was added against Ms. Jones for failure to report, in this proceeding, the filing of certain other FM applications. (*Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1347, released May 25, 1990.) The markets involved were Ellettsville, Indiana; Brownsburg, Indiana; Homewood, Alabama; Lexington, Kentucky; and Bethalto, Illinois. The amendment reporting the filing of these applications was submitted in this proceeding eight months late. (Jones Ex. 3, p. 2.)

134. Ms. Jones has no clear recollection of why an amendment reporting the filing of the referenced applications was not timely filed. (Jones Ex. 3, p. 1.) Other timely reporting amendments were filed in this proceeding relative to all other proceedings in which she was an applicant or a principal. (Jones Ex. 3, p. 1.) However, Ms. Jones

offered the explanation that she did not timely amend her application to update the status of her media interests because "[t]hese cases have become much more complicated and more detailed than I ever thought that they would be . . " (Tr. 1724.) With respect to the amendment required by the *HDO*, Ms. Jones said she read the *HDO* but did not recall specifically reading the paragraph requiring an amendment. (Tr. 1725.)

135. Jones tried to maintain her own records and checklist for each application, but the checklists did not help her determine when applications had to be updated so she depended on counsel for the real deadlines. She did not check with counsel to see that amendments were filed. (Tr. 1724-1726, 1826.) For the last two years, copies of Orders have been sent to her house, but Ms. Jones travels a lot. (Tr. 1985.) Ms. Jones said she knew she needed to file amendments for Modesto and other applications, but she was not aware of the 30 day deadline. (Tr. 1831; Jones Ex. 3, p. 3.)

136. Ms. Jones was previously president, director and shareholder of the General Partner of Telecommunications Partners, Ltd. (TPL) which filed applications in the early 1980s for new television facilities in Pensacola, Florida; Roanoke, Virginia; and Greenville, North Carolina as well as for FM stations in Wichita, Kansas; Atlanta, Michigan; and North Las Vegas, Nevada.[10] (Tr. 1718-1719; McMurray Ex. 5, p. 5.) As President of TPL, Ms. Jones signed and certified the applications. She admitted that reporting issues were added against TPL in Roanoke and Pensacola but did not remember the factual underpinning of those issues. She recalled them as technicalities. (Tr. 1719-1723.) Ms. Jones acknowledged that she was the individual responsible for keeping TPL's applications up to date. (Tr. 1993.)

137. Ms. Jones reviewed her files and calendar and believes that the need to file the amendment reporting on her other applications was identified during a review of her cases on a Saturday. When it was discovered the amendment had not been timely filed, her lawyer immediately prepared the amendment, and that amendment and similar amendments to her other pending applications were filed by mail the following Monday. The need to file the amendment occurred after her lawyer resigned from the law firm where he had extensive assistance from his support staff. (Jones Ex. 3, pp. 4-5.) In his subsequent practice, counsel lacked that assistance and was very busy. (Tr. 1724.) Jones believes that the failure to timely file the amendment at issue was first discovered on "March 11, 1988" (*sic*, March 11, 1989, *see* Jones Ex. 3, p. 2) during a review session with her lawyer. (Jones Ex. 3, p. 5.) She does not recall that her lawyer told her there was any great significance to the late-filing, and she personally believes it harmless because (a) the material was a matter of public record, (b) the applications were filed in her own name, (c) notices of the filing had been published in newspapers, and (d) copies of the applications were placed in public libraries. (Jones Ex. 3, pp. 5-6.)

COMPARATIVE COVERAGE

138. The following table lists the total areas and populations within the applicants' 1 mV/m contour. The data takes into account amendments by MBG and McMurray, because the amendments do not result in a comparative upgrading.

TOTAL AREAS AND POPULATIONS

Applicant	Area	(sq. km.) Population
MBG (as amended)	1,824	264,803
McMurray (as amended)	1,841	261,832
MCC	1,832	264,803
Ayala	1,824	264,803
BCD	829	195,845
Reinstein	1,829	264,803
Jones	1,824	264,803

139. The applicants stipulated that there are no underserved areas covered by any of their proposals. (Joint Engineering Ex. 2.)

ULTIMATE FINDING AND CONCLUSIONS

140. Of the thirteen applications designated for hearing, six remain: Modesto Broadcast Group (MBG); Harry S. McMurray (McMurray); Modesto Communications Corporation (MCC); BCD Limited Partnership (BCD); Thom Reinstein Communications, A California Limited Partnership (Reinstein); and Pamela R. Jones (Jones). Two of these applicants have had basic qualifying issues specified against their applications. Specifically, MBG and Jones must meet basic issues.[11] Because only basically qualified applicants are entitled to comparative consideration,[12] the basic issues will first be resolved before the comparative issue is addressed.

141. Several basic qualifying issues have been specified against MBG. Specifically, MBG must meet site availability/misrepresentation issues; financial qualification/misrepresentation issues; and a Section 73.1745 issue. The site availability/misrepresentation issues were specified based on allegations that MBG did not secure reasonable assurance to use the land owned by Ms. Jobe as a transmitter site before specifying such site in its application.

142. According to Sturtevant, he secured reasonable assurance to use Jobe's land during a second meeting with Jobe. The first meeting, which was also attended by Brandi Hart, Jobe's granddaughter, failed to result in any meeting of the minds which could be construed as reasonable assurance of site availability. In this connection, the Commission's requirement of reasonable assurance can be fulfilled when an applicant can show "some clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated, and that he would give notice of any change of intention." *Elijah Broadcasting Corporation*, 5 FCC Rcd 5350, 5351 (1990). A binding agreement or implied contract is not required. *National Innovative Programming Network, Inc. of the East Coast*, 2 FCC Rcd 5641 (1987).

143. Sturtevant's claim that he secured reasonable assurance from Jobe during a second visit is uncorroborated. Indeed, Hart's testimony makes clear that at the first meeting between Sturtevant and Jobe, Jobe refused to make her land available for a transmitter site. Significantly, Sturtevant's testimony on this issue was conflicting and resulted in his attempt to revise his testimony at the hearing. (Tr. 434-439.) In this connection, in his prepared and exchanged written testimony, Sturtevant claims that two meetings were held with Jobe; that Hart was present at both meetings; that the first meeting was for "only a few

minutes"; that at the second meeting the lease of the land was discussed, and Jobe agreed to allow Sturtevant to use her land for his radio application. (*See*, paragraph 38 of Findings.) Sturtevant acknowledged that this statement (which originally had been prepared and used in an opposition to a motion to enlarge issues) was wrong in significant respects; that Hart was present only at the first meeting; that the second meeting, at which Hart was not present, was the short meeting; that Sturtevant realized that his statement was wrong after reading Jobe's and Hart's statements and hearing their deposition testimony; that irrespective of this, MBG exchanged the statement (MBG Ex. 7) as Sturtevant's direct testimony on the site issues, and Sturtevant did not know why it was included for MBG's exchange. (Tr. 439.) The cavalier manner in which MBG submitted a knowingly incorrect direct case on these issues does not instill confidence in Sturtevant's testimony.

144. Unfortunately, the record does not contain the testimony of Jobe, the individual whose land Sturtevant proposed to use. The party having the burden of proceeding, *i.e.*, Reinstein, did not produce Jobe and neither did MBG, the party having the burden of proof. Without Jobe's testimony, it is difficult to resolve this issue. Hart's testimony indicates that reasonable assurance was not given by Jobe. Sturtevant maintains that such assurance was given by Jobe at a second meeting not attended by Hart. However, Sturtevant's version of the facts simply cannot be accepted at face value because of his changing and shifting testimony on this issue. Thus, it cannot be concluded that MBG has met its burden of proof on the site availability issue. More specifically, MBG has not shown that it secured reasonable assurance of the availability of its transmitter site before specifying Jobe's land in its application.

145. While MBG can now be found financially qualified, it does not appear that MBG had reasonable assurance of financing at the time it filed its application. Specifically, its financial certification was based on a letter from the Pacific Valley National Bank which stated that the "bank will be pleased to entertain your application" for a $500,000 loan subject to specified conditions. While the bank was familiar with Mr. Sturtevant, who had prior dealings with the bank, it had no knowledge regarding the financial condition of the other MBG principals. Moreover, the bank letter required an SBA guarantee for the loan, but the SBA did not guarantee loans for broadcast stations. Neither the banker nor Sturtevant inquired whether an SBA loan guarantee would be available before the bank letter was issued.

146. When an applicant relies on a bank letter for financial qualifications, the Commission requires that the bank have a present, firm intention to make the loan, future conditions permitting. *Merrimack Valley Broadcasting, Inc.*, 82 FCC 166 (1980).

147. Central to any "reasonable assurance" showing of a loan from a financial institution is that the individual qualifications of the borrower have been preliminarily reviewed; that adequate collateral has been demonstrated; and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (1990), *affirmed*, 6 FCC Rcd 1893 (1991). In the absence of such a showing, the Commission has found no reasonable assurance. *Rebecca Boedker*, 5 FCC Rcd 2855 (1990); *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7946 (1989). Here, the bank issuing the letter had no financial information on individuals having 60 percent of the equity of MBG. Also, the February 1988 letter itself states that the bank would be "pleased to entertain your application" on certain specified conditions, one of which could not be met. Specifically, the bank required that the loan be guaranteed by the SBA. Unfortunately, neither the banker nor Sturtevant bothered to inquire whether the type of loan contemplated could or would be guaranteed by the SBA. Thus, the bank relied upon by MBG for financing did not sufficiently review the individual qualifications of the principals of MBG before issuing its letter. Moreover, the collateral relied upon by the bank, namely an SBA loan guarantee, was not available. Because of these shortcomings, the February 1988 letter cannot be found to have provided MBG with reasonable assurance of financing. MBG appears to have certified its financial qualifications in good faith upon the strength of the bank letter, and MBG does not appear to have deliberately falsified its financial certification. But MBG, nevertheless, did not have reasonable assurance of financing when it filed its application, and its application must be denied for lack of financial qualifications. *Aspen FM, Inc.*, 5 FCC Rcd 3196 (1990). The good faith of the applicant has nothing to do with the question of whether the applicant was in fact financially qualified when it filed its application. *Aspen FM, Inc., supra.* Thus, even though MBG has shown its present financial qualifications,[13] it has not shown it was so qualified when it filed its application. MBG's application must, therefore, be denied.

148. Perhaps the most serious issue involving the qualifications of MBG is Sturtevant's willful and deliberate violation of Section 73.1745 in his capacity as general manager of KLOC. Section 73.1745 states that "[n]o broadcast station shall operate at times, or with modes or power, other than those specified and made a part of the license, unless otherwise provided in this part." The license for KLOC authorized the station to operate with 500 watts of power during the day and 2,500 watts of power at night using different transmitter sites and different directional antenna radiation patterns for day and night. As detailed in the Findings, Sturtevant acknowledged that he instructed the KLOC operators to disregard the notations to switch KLOC's operation at sunrise from the authorized nighttime power of 2,500 watts to the authorized daytime power of 500 watts. As a result, at the specific direction of Sturtevant, KLOC operated during the day with its nighttime power during the period from approximately late 1986 to February 5, 1987, when FOB inspectors visited the station.

149. There is a conflict between Sturtevant and Lester, KLOC's contract engineer, as to the reason why Sturtevant directed the KLOC operators to use nighttime power during the day. According to Lester, Sturtevant wanted to increase sales in Stockton and used nighttime power during the day to improve coverage of Stockton. Sturtevant maintains that he used nighttime power during the day because some of the station's listeners complemented the station on its improved sound. While there is evidence which shows that sales in Stockton, on a percentage basis, increased during the period KLOC was operating improperly, the dispute between Lester and Sturtevant need not be resolved. It is undisputed that Sturtevant deliberately directed that the station operate in an unauthorized manner. The reason why Sturtevant caused the station to operate illegally is not particularly relevant. Suffice it to note that Sturtevant willfully and deliberately directed that the

station operate in a manner totally inconsistent with the terms of its license during the period of late 1986 to February 5, 1987. In so doing, the provisions of Section 73.1745 were repeatedly and continuously violated. Such conduct disqualifies MBG, an applicant in which Sturtevant holds a 40 percent equity interest and is proposed as the general manager of the station.[14]

150. MBG argues that Sturtevant's testimony is more credible than Lester's; that four years have elapsed since the violation; that the transgression was an "isolated event" that does not disqualify Sturtevant; that the conduct is not indicative of Sturtevant's future propensity to comply with the Commission's rules; that KLOC paid a fine for the violation and had its license renewed. Finally, MBG argues that the Commission's *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986); *recon. denied*, 1 FCC Rcd 421 (1986); *mod.*, 5 FCC Rcd 3252 (1990) (*Character Policy Statement)*, fully supports finding that Sturtevant and MBG are qualified. The Presiding Judge is unpersuaded by these arguments.[15]

151. Contrary to MBG's argument, the Presiding Judge does not view the wrongdoing as an "isolated event," but rather as a willful, continuing violation that extended for a period of weeks and was terminated only after inspectors from the Commission's FOB office visited KLOC. Moreover, that the licensee of KLOC paid a fine and had its license renewed is not a relevant factor on the question of Sturtevant's personal involvement in the violations and the impact of such conduct on his qualifications. Finally, the Commission, in its *Character Policy Statement*, stated that, "we find it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or Policy, as possibly predictive of future conduct and, thus, as possibly raising concerns about the licensee's future truthfulness and reliability . . " (*Id.*, at 1209-1210.)

152. Here, Sturtevant willfully directed the KLOC disc jockeys to violate the terms of the station's license and to operate in violation of Section 73.1745 of the rules. These violations were continuous, and they were not so distant or remote to be unpredictive of Sturtevant's future conduct. Contrary to MBG's argument, the Presiding Judge views this conduct as disqualifying under the Commission's *Character Policy Statement*.[16]

153. Jones must be disqualified for her failure to meet the financial qualifications issue specified against her application. In this connection, Jones filed and had pending at the same time, applications to build and operate 12 stations. Pursuant to Commission requirements, Jones was obligated to demonstrate her financial ability to build and operate all the stations. *Willie A. Jefferson d/b/a Opportunity Broadcasting of Shreveport*, 6 FCC Rcd 1499, 1500 (1991).

154. Thus, Jones was required to show "sufficient net liquid assets on hand, or committed sources of funds to construct and operate [the requested facilities] for three months without revenue." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). Jones has failed to make such showing.

155. According to Jones, she relied on a bank letter from the Florida National Bank. But Jones has failed to establish that the bank letter she relied upon was, in fact, a letter providing "reasonable assurance" of financing. Rather, the letter fails to meet the test enunciated in *Scioto Broadcasters*, cited *supra*, and appears to constitute an "accommodation letter." Specifically, the bank letter failed to state the collateral or repayment terms; Jones did not provide the bank with a business plan or a personal financial statement; she did not complete a loan application; nor did she ever previously borrow money from the bank or have an account at the bank; and the banker issuing the letter was a personal friend of Jones and her attorney. Finally, when directed to produce the banker who issued the bank letter upon which Jones relied for her financial qualifications, she refused to produce him. Nor did Jones produce a second banker who provided Jones with other purported letters of reasonable assurance. As a consequence, the bank letters upon which Jones relied were not received in evidence to establish the availability of funds from committed sources. Thus, Jones has provided no reliable probative evidence establishing her financial qualifications at the time she filed her Modesto and other applications. When a financial issue is specified, the applicant must adduce probative evidence which "necessarily includes something more than the self-serving, uncorroborated statement[s] of the individual responsible for the certification that he had taken steps to secure the needed funds." *Northampton Media Associates*, cited *supra*.

156. Because of Jones' failure to meet the financial issue, such issue must be resolved against her. This is an issue of basic qualifications and the Commission, in the past, has denied applications on financial grounds without reaching the subjective question of whether there also existed a conscious intent to deceive when the applicant certified its financial qualifications. *Aspen FM, Inc.*, cited *supra*. Thus, because Jones' application must be denied for lack of financial qualifications, it is unnecessary to reach the issue of financial misrepresentation.

157. The Section 1.65 issue was specified against Jones because she did not timely file a 1.65 amendment to report the filing of other applications, and she filed an amendment required by the *HDO* in an untimely manner. While Jones has clearly violated the provisions of Section 1.65 of the rules in failing to timely file amendments, the violations are not sufficiently grievous to warrant the denial of Jones' application. In this connection, the information relating to Jones' other applications were matters of record before the Commission and no intent to conceal has been shown or can be inferred. *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6354 (1988), *Superior Broadcasting of California*, 94 FCC 2d 904, 908-909 (1983). This type of violation, prior to the Commission's *Character Policy Statement*, would result in a comparative demerit. But such a demerit is no longer an option, and the conduct shown simply does not warrant disqualification.

158. With respect to the issues specified by the Presiding Judge involving Jones' possible violations of Section 73.3555 and 73.3518, and which have not been litigated (*see*, paragraph 3), no useful purpose would be served to delay resolution of this case by trying such issue. First, Jones has already been disqualified under the financial issue. Secondly, Jones has not proposed any integration and would not be the preferred applicant under the comparative issue. Finally, the Review Board, in *Atlantic Radio Communications, Inc.*, 7 FCC Rcd 486 (1992), indicated that the remedy for filing inconsistent applications is the dismissal of the latest filed application. (*See*, Footnote 4.) Thus, because Jones has already been disqualified and cannot in any event prevail in this case, and further because of the uncertainty whether the allegations are disqualifying, there is no need under the circumstances to try the remaining issue outstanding against Jones.[17]

159. MBG and Jones have been disqualified, and they are not entitled to comparative consideration.[18] *Guinan* v. *Federal Communications Commission*, cited *supra*. Thus, the applications of McMurray, MCC, BCD, and Reinstein must be evaluated under the comparative issue.

160. In its 1965 *Policy Statement on Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393, the Commission established the two primary objectives toward which the process of comparison should be directed: (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications.[19]

161. MCC and McMurray have no attributable media interests. Arguments are advanced that BCD and Reinstein should both be assessed a diversification demerit. In connection with BCD, it is argued that Bustos, a limited partner in BCD with media interests, has not been a passive investor, and therefore his media interest should be attributed to BCD. This argument will be considered under the integration factor. If Bustos is not found to be a "passive" investor, then BCD will receive a diversification demerit for Bustos' media interests. Regarding Reinstein, it is argued that his production company is an attributable media interest.

162. Reinstein owns a production company which produces a weekly two-hour syndicated radio program, "Portraits in Sound," which is broadcast on 80 radio stations nationally. This is strictly a musical program, and it is difficult to comprehend how such a syndicated program would adversely impact the Commission's diversification criterion. A production company is not considered a media interest unless "the production company undermines the objectives underlying the principle of diversification of control of mass media, *i.e.*, maximizing available program services and viewpoints . . " *Morris, Pierce & Pierce*, 50 RR 2d 959, 968 (1981). An entertainment program, such as "Portraits in Sound," is entirely different from the minority-owned discussion program "Looking Black" considered in *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (1983), where a concern was expressed about "a redundancy of viewpoints, particularly minority viewpoints." But even this interest was found to be *de minimus*. The entertainment program produced and syndicated by Reinstein constitutes an even more tenuous impact on diversification. Such an interest has no bearing on diversification, and no demerit against Reinstein will be assessed.[20]

163. McMurray, MCC, BCD, and Reinstein all seek 100 percent full time integration credit. McMurray bases his claim on his proposal to work full time as the general manager of his station; MCC bases its claim for 100 percent integration credit on its proposal to integrate full time its two voting stockholders, Elmer and Phyllis Gunkel, who each own 25 percent of the equity, into the management of the station; BCD bases its claim for 100 percent integration on its proposal to integrate full time as its general manager, Salvadore Campos, its sole general partner who has a 33 1/3 percent equity interest in BCD; Reinstein bases its claim for 100 percent integration credit on its proposal calling for the full time integration of Thom Reinstein, the sole general partner with a 50 percent equity interest, into the management of the station as general manager. These claims for 100 percent integration credit are challenged for various reasons by the competing applicants.

164. It is argued that McMurray cannot receive integration credit because McMurray, as a result of a non-compete agreement, will not be able to construct and operate a Modesto station. Specifically, McMurray entered into a non-compete agreement in July 1985 in connection with the sale of KCBY(AM) and KMIX(FM), Turlock, California. This agreement, in effect, precluded McMurray from engaging in the radio business in certain counties, including the city of Modesto, for eight years. In consideration of this, the purchaser (Radio Associates, Inc.) agreed to pay the seller $250,000 in installments over an eight-year period.

165. Clearly, this non-compete agreement precluded McMurray from building and operating a station in Modesto. However, McMurray argues that he reached an agreement with Kenneth Miller, the President of Radio Associates, Inc., in 1987 to modify the agreement. Specifically, McMurray was interested in acquiring a broadcast station in a community north of Modesto. He discussed with Miller an arrangement whereby McMurray would be permitted to own such station in exchange for McMurray's forgiveness of further payments by Radio Associates under the non-compete agreement, provided that McMurray would not program the station with a country and western format. While this type of a modification to the non-compete agreement was discussed, nothing further was ever done. (*See*, paragraph 70.) Payments continued to be made to McMurray by Radio Associates. Thus, it appears that while Radio Associates was agreeable to a modification to the non-compete agreement under certain conditions, no modification was ever made. Accordingly, when McMurray filed his application to build a station in Modesto, and when he proposed to be the full time general manager of the station, he was contractually precluded from owning or operating the Modesto station because of the non-compete agreement he had entered into with Radio Associates. This situation would not be unlike one where an applicant is denied integration credit because of other inconsistent, contingent, or conflicting arrangements or commitments. (*See*, for example, *Charisma Broadcasting Corporation*, 6 FCC Rcd 3411 (1991); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952 (1988), *recon. denied*, 3 FCC Rcd 5631 (1988); *rev. denied*, 5 FCC Rcd 5561 (1990); *Coastal Broadcasting Partners*, 7 FCC Rcd 1432 (1992), (to the extent that a McDonald's franchise's obligation to integrate into restaurant management could result in denial of integration credit to an applicant). The point is that McMurray was prohibited by contract from building or operating the station when he filed and when he submitted his integration statement. Under these circumstances, McMurray will not be awarded any integration credit.[21]

166. It is argued that MCC should not receive 100 percent integration credit because its voting stockholders, who propose to be integrated, have not been sufficiently involved in MCC's application; that the non-voting shareholders have not been passive and, therefore, should be included in the integration analysis; and that MCC's third director, who holds no ownership interest, should be included in calculating MCC's integration credit.

167. Of the two voting stockholders who propose to be integrated, Elmer Gunkel has clearly been more involved in the application process. For example, he hired counsel; he, together with counsel, put together the budget for construction and initial operation; and he prepared the application in long-hand. Thus, the arguments questioning

Mr. Gunkel's level of involvement or participation are not well founded. He has been directly and personally involved in the application process and entitled to integration credit as the proposed full-time general manager of the station.[22]

168. A closer question is presented with regard to Phyllis Gunkel. Mrs. Gunkel is proposed to serve as the full time business manager, which will include all business and financial aspects of the station. Her integration claim is attacked because, it is argued, she has been rather passive and has permitted her husband to take charge and make the decisions; she did not prepare the station's budget; she has shown no active participation in or knowledge of the applicant's affairs; she had no contact with MCC's engineers or attorney who prepared the corporate documents; and that Mrs. Gunkel will continue to rely on her husband to make the decisions and, under those circumstances, she is not entitled to integration credit.

169. It appears that Mr. Gunkel, rather than Mrs. Gunkel, has been the most active principal in the preparation and prosecution of the MCC application. However, Mrs. Gunkel has been involved to the extent of discussing the application with her husband (Tr. 677-678); she saw the articles of incorporation and by-laws of the corporation and was familiar with the structure and ownership of MCC (Tr. 679-680); she supplied information which went into the application (Tr. 681); she attended a meeting at which items to be included within the MCC budget was discussed (Tr. 649); she handled the local newspaper publication (Tr.636); and she handles the corporate records and finances (Tr. 645, 685). These examples illustrate that Mrs. Gunkel has not been totally unfamiliar with the MCC application or wholly ignorant of her future duties. *Religious Broadcasting Network*, 3 FCC Rcd 4085 (1988), *recon. granted in part and remanded on other grounds*, 3 FCC Rcd 6216 (1988). Mrs. Gunkel's integration proposal has not been shown to lack credit worthiness. Moreover, while some of her duties at the station may not be at the policy-making level, this should not detract from her overall credit for being the business manager of the station. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064 (1989); *recon. den.*, 5 FCC Rcd 581 (1990). Her integration proposal will be credited.

170. It is argued that the non-voting interests of Edward and Dolores Cardoza should be included in the calculation of MCC's integration credit. In *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission declared that where an applicant has adopted an ownership structure that provides that a previously active owner will thereafter take a purely passive role and where the applicant thereafter adheres to that changed ownership structure without exception, the Commission will not attribute the equity interest of that owner to the applicant for integration purposes. Here, it has not been shown that the Cardozas have been active at any time in the preparation or prosecution of the MCC application. They were not the originators of the project nor did they take an active role in any of the affairs of the applicant. They have been strictly passive investors, and there is no valid basis for attributing their interest. The speculation of what Mrs. Gunkel will do in the future or what Mr. Cardoza will do if asked[23] is not a valid basis to impute the Cardozas' interest for integration purposes.

171. Finally, it is argued that because MCC has a third director, William H. Gunkel, it is not entitled to 100 percent integration credit. This claim is based on the argument that the board of directors controls the applicant corporation and, therefore, the vote of such director should be taken into account in awarding integration credit. This argument has no merit. The Commission awards integration credit to owners who propose to manage the station. William Gunkel, the third director of MCC, has no ownership interest. He was named a director to comply with the laws governing corporations in the state of California. Being a member of the board of directors of MCC with no stock ownership does not dilute the integration credit of Mr. and Mrs. Gunkel, the sole voting stockholders. No cases have been cited which attribute a director's interest, when such director has no ownership interest, solely because he is a director. Indeed, the cases relied upon to support this argument involve far different factual situations. For example, the cases relied upon involved ownership interests in addition to being a director. *Religious Broadcasting*, cited *supra*. There is no valid basis for diluting MCC's integration credit solely because the corporation has a third director who has no ownership interest.

172. MCC's 100 percent integration credit is qualitatively enhanced by the Gunkels' proposal to move to Modesto; to install auxiliary power equipment; and the past broadcast experience of Mr. Gunkel, which is for comparative purposes, of minor significance under the *Policy Statement*. While the Gunkels previously resided in Modesto, such residence occurred in 1950-1951 and 1957-1960, too remote in time to warrant meaningful credit. Moreover, while Mrs. Gunkel, under Commission policy, would have received merit for her gender, the award of such preference has been held to be unconstitutional in *Lamprecht* v. *Federal Communications Commission*, No. 88-1395 (February 19, 1992). Thus, no female enhancement credit will be awarded.

173. BCD's claim for 100 percent integration credit, as noted, is based on its proposal to integrate its 33 1/3 percent equity owner and sole general partner (Campos) as the full time general manager of the station. This claim for 100 percent integration credit is attacked on various grounds. In this connection, it is argued that BCD's limited partnership agreement does not insulate the limited partners; and that Bustos has actively participated in partnership affairs and, thus, his 33 1/3 percent interest must be factored into BCD's integration credit.

174. First, the BCD partnership agreement contains broad language which insulates the limited partners from participation in the affairs of the partnership. (*See*, paragraph 97.) These provisions require the limited partners to be solely passive investors who are precluded from influencing the general partners' operation of the day-to-day business of the partnership. They may not serve as an employee, independent contractor, or consultant, or provide services to the partnership. Where limited partners are passive investors without material involvement in the application, the interests of the limited partners should not count for integration purposes, and the media interests of adequately insulated limited partners are exempt from comparative consideration. *Cotton Broadcasting Company*, 4 FCC Rcd 1781, 1783 (1989); *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *recon. granted, in part*, 58 RR 2d 604 (1985); *further recon. granted, in part*, 1 FCC Rcd 802 (1986). Here, the BCD partnership agreement contains language which, if followed, would insulate the limited partners, and the arguments to the contrary are rejected.

175. It is clear that Bustos was the originator of the project which became the BCD limited partnership. It is equally clear from the Findings that Bustos was actively and pervasively involved in practically every important action and decision made by the partnership. Specifically, it was Bustos who identified the law firm to be retained to prepare and prosecute the application; it was Bustos who suggested the engineer; it was Bustos who provided the general partner with the station's budget; it was Bustos who provided the general partner with the business plan; Bustos, together with the general partner, selected the proposed station's transmitter site; Bustos discussed with the general partner the program format of the proposed station; Bustos suggested to the general partner that a loan commitment letter be obtained from CVC Capital Management Corporation; Bustos prepared the initial draft of the BCD partnership agreement; and, finally, Bustos submitted an amendment to the BCD application relating to his media interests over his signature. While the general partner prepared the application with the assistance of counsel, the important decisions regarding the partnership involved the active and direct participation of Bustos.

176. In *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission addressed the problem of assessing limited partnership applicants presenting an active limited partner at the preformative stages of the entity, but who then became entirely passive once the limited partnership structure was adopted. The Commission stated that:

> . . . where an owner has assumed an active role after the applicant has declared that the owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement. In contrast, where an applicant adopts an ownership structure providing that a previously active owner will now have a passive role and thereafter adheres to that changed ownership structure without exception, . . . we will not attribute the equity interest of a passive owner to the applicant for integration purposes even though that owner may have been active in initiating or financing the application before the applicant adopted an ownership structure specifying a passive role for that owner.

Coast TV, *supra*, at 2753 (footnotes omitted).

177. As already noted, Bustos was clearly an active principal in the BCD partnership, and his participation permeated the important activities that went into the creation and development of the BCD application. While some or all of Bustos' activities may have occurred prior to the formation of BCD as a limited partnership, and prior to the filing of BCD's application with the Commission in which BCD held Bustos out to the Commission as a passive partner, it is undisputed that Bustos executed an amendment to BCD's application in June 1989, well over a year after such holding-out had occurred. Under those circumstances, BCD has not adhered "without exception" to its representation that Bustos would play a purely passive role following the formation of the limited partnership.

178. Moreover, in *Edward Royce Stoltz, II, t/as Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), the Commission made clear that when an applicant disregards its partnership formalities in conducting its affairs, all passive interests of the limited partners will be attributed in calculating integration credit. This results because the Commission has no assurance that the applicant will comport itself in accordance with its organizational structure in the future. Simply stated, the reliability of the proposal is suspect. Here, Bustos' active and pervasive participation in the partnership affairs continued with his filing of an amendment to the BCD application after the limited partnership was formally adopted with Bustos being represented to be a passive principal. Because of this, there can be no assurance that the general partner will hold and exercise exclusive control over BCD. Therefore, the equity interests of the limited partners will be attributed for the purpose of calculating integration credit, and BCD will be awarded only 33 1/3 percent integration credit. This credit is enhanced because of Campos' status as a Hispanic, by his proposed future residence, and his past broadcast experience. The BCD application receives a slight diversification demerit because Bustos' media interests must be attributed to the applicant.

179. Reinstein's claim for 100 percent integration credit is challenged on various grounds. Specifically, it is argued that Reinstein has been passive regarding the application and has not been sufficiently active in the preparation and prosecution of the application to merit 100 percent integration credit. Further, it is argued that Reinstein has made a negligible financial contribution to the applicant, that he has no "financial stake," and his contribution of services renders the applicant's structure suspect and unworthy of credit. Finally, it is argued that the limited partners' interest should be considered in determining integration credit, and that Reinstein's production company will prevent him from implementing his full-time integration commitment. The Presiding Judge is unpersuaded by these arguments.

180. Reinstein utilized the services of a broadcast consultant (Consolidated Broadcast Services) in the preparation of the application, but that does not mean that Reinstein was not active in the application process. He was clearly the moving force in the initiation of the Reinstein partnership, and he was the principal who was active in the preparation and prosecution of the application. (*See* paragraph 107.) Thus, with the assistance of Consolidated, counsel, and the engineer, Reinstein prepared the application; prepared a budget; secured a transmitter site; gathered data for the EEO program; prepared the station's program service statement; set up the public file; and published the local notices. Reinstein has not been passive and the arguments denigrating his integration claim, for this reason, are rejected.

181. Reinstein has contributed very little in the way of money to the partnership or the prosecution of the application. Except for paying expenses associated with his deposition, he has relied on the limited partner to supply all the funds for the prosecution of the application and the construction and operation of the station. Indeed, the partnership agreement provides that Reinstein will receive his 50 percent equity interest for his services while the limited partner will receive his 50 percent equity interest for providing all the funding of the partnership activities. The limited partner, who is a farmer and never been a broadcaster, is Reinstein's brother-in-law and long-time family friend. Because of this arrangement, it is argued that Reinstein does not have a "financial stake" and is therefore not entitled to integration credit.

182. The cases relied upon to support his argument are not on point. In *KIST Corp.*, 99 FCC 2d 173 (1984), claimed integration credit of 95 percent (or 80 percent) was denied, not because the principal had made no financial contribution, but because the 5 percent principal "has solely controlled, and will for the foreseeable future control the actual destiny" of the applicant, and that such 5 percent owner "totally controls the flow of the" applicant, "can shift course at will, or can stop it dead in the water at any time." No such control is here vested in the limited partner, who has agreed to finance the venture which has been and will be controlled and operated by his long-time family friend and brother-in-law, Reinstein, who has past broadcast experience and has been the moving force in the applicant. There is no general prohibition against awarding integration credit solely on the basis that a principal has not made a financial contribution to the applicant. *Doylan Forney*, 5 FCC Rcd 5423 (1990); *San Joaquin Television Improvement Corp.*, 54 RR 2d 1206 (1983). Nor is the amount of the general partner's investment relative to that of the limited partner's investment, by itself decisionally significant. *Doylan Forney*, at 5427, and cases cited therein.

183. The partnership agreement insulates the limited partner and there is no reasonable basis for invalidating the passive nature of the limited partner's interest. No action has been taken by the limited partner which would render the partnership arrangement suspect or indicate that the limited partner will be active in the future in disregard of the provisions in the limited partnership agreement. The limited partner is a farmer, not a broadcaster, and he has decided to financially underwrite his brother-in-law in seeking a radio station which his brother-in-law will build and operate. There is here no strained attempt to create a limited partnership structure to garner enhanced integration credit for minority and/or female ownership. It is a family partnership arrangement which has not been shown to lack reliability or constitute a faulty or artificial structure.

184. Reinstein's ownership of a production company will not prevent him from implementing his integration commitment. The production company produces only one program, "Portraits in Sound," a two-hour weekly entertainment program. This program takes Reinstein about three hours a week to produce. Since the program was licensed to Radio Today Entertainment (Radio Today) in 1988, Reinstein has been relieved of the responsibility of selling commercials for the program and marketing the program to radio stations. This is now handled by Radio Today.

185. It is Reinstein's proposal to turn over all production responsibilities for the program "Portraits in Sound" to Pacific Media Group (Pacific), a full time production facility. In this regard, Reinstein has made an arrangement with Ken McCall, the owner of Pacific, regarding the production of the program. Reinstein also intends to hire an employee who will act as an intermediary with Pacific and report to Reinstein. At present, although Reinstein spends about 30 hours a week at his office, it only takes three hours to produce the "Portraits in Sound" program, and the rest of the time Reinstein doesn't do very much. He opens mail, pays bills, answers the telephone, and talks to record company representatives. With the assignment of the actual production of the program to Pacific and the employment of an individual who will be supervised by Reinstein, there is no reason why Reinstein should be unable to implement his full time integration commitment. Thus, Reinstein will be credited with 100 percent full time integration credit. Such credit is enhanced by Reinstein's residence within Modesto since 1982, his limited involvement in civic organizations, most of which occurred after Reinstein filed his application, and his broadcast experience.

186. MCC and Reinstein have both been awarded 100 percent integration credit while BCD has been awarded 33 1/3 percent integration credit. Because of the great disparity in quantitative integration credit between MCC and Reinstein on the one hand and BCD on the other, there is no need to consider BCD's qualitative enhancements. *Kennelwood Broadcasting Company, Inc.*, 6 FCC Rcd 2894 (1991); *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (1982); *Van Buren Community Service Broadcasters, Inc.*, 1018, 1022 (1981). As between MCC and Reinstein, the qualitative enhancement factors favor Reinstein. Specifically, Reinstein has been credited with 100 percent local residence since 1982, whereas MCC is credited only with a proposal to move to Modesto. Both propose auxiliary power. Reinstein has 100 percent past broadcast experience, while MCC has 50 percent past broadcast experience. With respect to the attributes pertinent in this case, local residence, which significantly favors the Reinstein application, is a fundamental consideration in the Commission's licensing scheme and is here entitled to the greatest weight. *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269 (1990).[24] Thus, the Reinstein application is preferred over the MCC application under the comparative issue and a grant of its application will best serve the public interest, convenience, and necessity.[25]

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Thom Reinstein Communications, A California Limited Partnership (File No. BPH-880301OU) for a construction permit for a new FM station on Channel 230A in Modesto, California, IS GRANTED; and the applications of Modesto Broadcast Group (File No. BPH-880229MB), Harry S. McMurray (File No. BPH-880301MP), Modesto Communications Corporation (File No. BPH-880301NC), BCD Limited Partnership (File No. BPH-880301OS), and Pamela R. Jones (File No. BPH-880301OY) ARE DENIED.[26]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] By *Orders*, FCC 90M-803 and FCC 90M-804, released April 13, 1990, the Presiding Judge dismissed, with prejudice, the applications of Stanislaus Communications Corporation (File No. BPH-880301MR), Great Scott Broadcasting (File No. BPH-880301OG), Chia-Ling Farnham (File No. BPH-880301NY), and Fourway FM Broadcasting Limited Partnership (File No. BPH-880301OC). By *Order*, FCC 90M-1889, released June 29, 1990, the Presiding Judge dismissed, with prejudice, the application of Eileen S. Lapin, Douglas M. Lapin and Stanley P. Lapin d/b/a Lapinco (File No. BPH-880301NJ). By *Memorandum Opinion and*

Order, FCC 90M-2294, released July 31, 1990, the Presiding Judge dismissed, with prejudice, the application of Juarez and Flores, Inc. (File No. BPH-880301OJ).

[2] Because the Findings and Reply Findings filed by MBG did not contain paragraph numbers, MBG was directed to refile those pleadings in accordance with the requirements of Section 1.264 of the rules. Those pleadings were refiled on July 12, 1991.

[3] Magana left station KLOC(AM) on October 26, 1990. (*See*, MBG's amendment filed November 7, 1990.)

[4] On July 2, 1990, MBG filed a petition for leave to amend which reported that Ms. Magana had sold her 1.95 percent stock in KLOC in December 1989.

[5] KLOC received authority from the Commission to operate at night in 1984.

[6] In June 1979, McMurray acquired Station KVRD, Cottonwood, Arizona, which he continued to own until 1987. In 1982, he acquired an interest in Behan Broadcasting, licensee of Stations KLMR and KSEC(FM), Lamar, Colorado, KCEE and KWFM(FM), Tucson, Arizona, KKMT-FM, Seattle, Washington, and KMIX(FM) and KCEY, Turlock, California. He subsequently acquired ownership interests in Stations KMIX(FM) and KCEY and Stations KTMS and KHTY(FM), Santa Barbara, California. (McMurray Ex. 2, pp. 2-3.)

[7] There is a fixed limit on the amount Mr. Thomsen intends to contribute to the partnership. (Tr. 1488, 1543-1544.)

[8] By *Order*, FCC 92M-16, released January 8, 1992, an amendment to the Reinstein application was accepted which reported the cancellation of the program "Portraits in Sound."

[9] Jones has not spoken to Anderson since the end of 1988. She did not know that the Florida National Bank had merged with another bank, and Anderson was no longer with the bank.

[10] All of these applications were dismissed or settled. (Tr. 1716.)

[11] The BCD air hazard issue was resolved in favor of the applicant by Summary Decision. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-1306, released May 22, 1990.)

[12] *Louis Adelman*, 29 FCC 1223 (1960), *affirmed sub. nom.*; *Guinan* v. *Federal Communications Commission*, 297 F. 2d 782 (1961).

[13] Sturtevant's father has agreed and is able to provide the Bank with sufficient collateral and, for this reason, the applicant has been found to be presently financially qualified. (*See*, paragraphs 50 and 51.)

[14] Sturtevant testified that he was of the view that KLOC could operate with its authorized nighttime power during the day as long as it caused no interference. Having regard for Sturtevant's broadcast experience, the Presiding Judge finds such testimony incredible and unworthy of belief. It is preposterous to believe that Sturtevant honestly thought he could operate KLOC in any manner he wished without regard to the terms and conditions specified in the station's license.

[15] During his hearing testimony, Sturtevant denied directing KLOC to broadcast during the day with nighttime power to increase coverage to Stockton. Sturtevant was denying the reason for operating illegally (to increase coverage to Stockton), not the illegal operation. Thus, no adverse conclusion is reached on this score.

[16] MBG's reliance on *RKO General, Inc. (WAXY-FM) (RKO)*, 5 FCC Rcd 642 (1990) is misplaced. First, the Commission in *RKO* recognized the "unusual public interest benefits of the settlement process in the RKO proceedings . . " Even then, the wrongdoers were not unconditionally found qualified to acquire additional stations. Here, Sturtevant has been found unqualified on the basis of his willful and personal wrongdoing at KLOC, violations for which he has not previously been personally held to account. Perhaps, in the future, Sturtevant can make the necessary showing in accordance with the Commission's pronouncements in *RKO* which would qualify him to acquire a broadcast station.

[17] Should Jones again file an application, this outstanding and unresolved issue must be disclosed and the matter can, at that time, be revisited.

[18] As noted in the Findings, MBG's Limited Partnership Agreement was significantly flawed, and it is highly doubtful that the limited partners were properly insulated. (*See*, paragraphs 9-13.) In any event, MBG has been disqualified, and it is not entitled to comparative evaluation with the qualified applicants.

[19] But, *see, In the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings*, FCC 92-98, released April 10, 1992. Nevertheless, the 1965 *Policy Statement* governs this case. (*See*, paragraph 41 of FCC 92-98.)

[20] The cases relied upon by the other applicants are not controlling. For example, in *Religious Broadcasting Network*, 3 FCC Rcd 4085 (1988), 12 hours per day of television programming was to be provided to a same-state television station. Here, only a two-hour weekly entertainment program is involved. Also, the media interests in *Harriscope of Chicago, Inc.*, 65 RR 2d 1512, 1518 (1989) are vastly different from those in this case.

[21] The argument that McMurray's consulting services will interfere with his integration proposal is rejected. There is no evidence to support this argument. Indeed, it appears that the consulting services rendered by McMurray will not interfere with his ability to implement his integration proposal.

[22] It is argued that because Mr. Gunkel has undergone heart by-pass surgery that somehow this requires a denial of integration credit. This argument is rejected. Mr. Gunkel is currently employed, he is under no medical restrictions or medication which would adversely impact his integration commitment, and there is no reason on the grounds of his health for questioning his integration commitment.

[23] It is argued that because Mrs. Gunkel suggested that she did not think there was any prohibition against her seeking business advice from Mr. Cardoza (Tr. 696), and Cardoza said that, if asked by Mr. Gunkel, he would provide construction services to MCC (Tr. 721-722), that this requires that the Cardozas interest be attributed. These were speculative, ambiguous statements that do not warrant the attribution of the Cardozas' interest. What is paramount is that the Cardozas have not been active in MCC's application, they have been strictly passive, and they look upon the MCC project as a passive investment.

[24] MCC has 50 percent female ownership and participation, but, as noted, credit for gender has been held to be unconstitutional in *Lamprecht* and will not be credited here. In any event, female ownership has less significance than local residence. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064 (1989), *affirmed sub nom.*; *Da-Gon Broadcasting Co., Inc. v. Federal Communications Commission*, 923 F.2d 200 (D.C. Fir. 1991); *Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985).

[25] There are no underserved areas, and therefore none of the proposals is deserving of a preference on this score. However, MCC and Reinsten, which have almost identical coverage characteristics, are entitled to a very slight preference over BCD because of greater overall coverage. (*See*, paragraph 139.)

[26] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Satellite Corporation — File No. CSS-90-001

For Authority to Participate in an INTELSAT program involving the Construction of Additional INTELSAT VII Satellites and the Procurement of Appropriate Launch Vehicles

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 18, 1992; Released: June 3, 1992

By the Commission:

1. The Commission has before it an application filed by the Communication Satellite Corporation (Comsat) seeking authority, pursuant to Section 201(c) of the Communication Satellite Act of 1962, as amended, 47 U.S.C. § 721(c) and Sections 214, 308, 309 and 319 of the Communications Act of 1934, as amended 47 U.S.C. §§ 214, 308, 309 and 319, to participate in a program for both the construction of two modified INTELSAT VII satellites (INTELSAT VIIA) and the procurement of appropriate launch vehicles[1] by the International Telecommunications Satellite Organization (INTELSAT), to be used commencing in the 1995/96 time frame to replace existing satellites in the Atlantic Ocean Region (AOR) that will reach the end of design life in that time frame.

2. The application was filed on January 11, 1990 and was supplemented on October 12, 1990 and January 28, 1991. Pan American Satellite (PAS) filed comments seeking either to defer action on the application or to set the application for a hearing. In response, Comsat filed an opposition to which PAS replied.[2]

I. APPLICATION

3. The instant application seeks authority for Comsat to participate in the procurement of two INTELSAT VIIA satellites. On October 12, 1990 Comsat supplemented its application to include updated traffic projections and optional design modifications, as well as information indicating that INTELSAT's Director General might seek approval for the procurement of two INTELSAT VIIA satellites at the December, 1990 Board of Governors meeting. The two INTELSAT VIIA satellites are projected to replace the last two INTELSAT VAs, the F-13 and the F-15, located in the AOR at 307^{0}E.L. and 342^{0}E.L. which will reach the end of design life in the 1995/1996 time frame.

4. In its January 28, 1991 further supplement, Comsat informed the Commission that the Board of Governors, at the December, 1990 meeting, authorized the Director General to award Space Systems/Loral an order for two INTELSAT VIIAs, incorporating the ATM-4H design option.[3] Comsat expects delivery of the first spacecraft in late 1994/early 1995, with the second spacecraft to follow five months later. Comsat further informed the Commission of the Board's determination that decisions with respect to the creation of additional satellite roles to accommodate projected growth in the three ocean regions would be the subject of future Comsat applications. The Board also decided to address at a future meeting any recommendations the Director General might have on the procurement of the launch and associated vehicles. Decisions regarding potential technical additions to the INTELSAT VIIAs were also deferred for consideration.

5. The procurement of two INTELSAT VIIA satellites is based on the need to maintain INTELSAT's nominal deployment plan which serves as the baseline configuration for planning purposes for procurement decisions. The INTELSAT VIIA satellites will be part of the nominal 9+1(+3) configuration[4] (plus the INTELSAT-K for near term Ku-band demand in the AOR) which Comsat believes represents the plan upon which INTELSAT's procurement decisions can be based throughout the 1990's. Comsat states that two operational satellites in the AOR will come to the end of their nominal orbital design lives in the 1995/1996 timeframe. Assuming a total of two launch or in-orbit failures out of the next seven launches, Comsat asserts that it will be necessary to purchase two additional satellites as replacement satellites to be deployed in the 307^{0}E.L. and 342^{0}E.L. orbital locations in order to maintain the existing INTELSAT system configuration.

6. The baseline INTELSAT VII design is for a high connectivity, hybrid spacecraft which would make available the benefits of higher effective isotopic radiated power (e.i.r.p.) satellites intended to operate with smaller earth stations. Comsat states that incorporation of the ATM-4H modifications on the two INTELSAT VIIAs will enhance the Ku-band capacity at the 307^{0}E.L. and 342^{0}E.L. orbital positions in order to respond to market demand for higher e.i.r.p. and additional bandwidth at Ku-band. The ATM-4H design would provide an extended bus, more capable batteries and additional solar array panels to support an enhanced communications payload, enabling an additional launch mass of 350 Kg. and additional prime power generated capability of 1400 Watts.[5] In order to enhance the performance at Ku-band, INTELSAT is introducing dual polarization capability by overlapping cross-polarized Ku-band spot beams and four additional 112-MHz transponders. The switching flexibility of the four oppositely polarized 112-MHz transponders, capable of being switched by ground command on a channel-by-channel basis, would allow INTELSAT to match capacity to demand at any given orbital location. As a result, Comsat notes that there will be four-fold frequency reuse at Ku-band, thereby increasing transmission efficiency and promoting more efficient orbital utilization.

7. The total fixed price of the two INTELSAT VIIAs is estimated at $202,403,000 in October 1990 dollars with an additional 33% in-orbit performance incentive. The breakdown of the total costs is: $123,903,000 for the baseline spacecrafts, $38,500,000 in non-recurring costs for the ATM-4H design modifications and $40,000,000 in recurring costs for the ATM-4H design modifications.

8. In its initial application, Comsat provided traffic projections for major service segments from its 1988 and 1989 Director General (DG) Forecasts which were generated by

user input from the 1988 and 1989 INTELSAT Global Traffic Meetings (GTM). Comsat points out that the DG Forecasts are primarily based on user input provided at the GTM which is then revised to take into account supplemental information obtained by the DG. According to Comsat, the DG Forecast is the best estimate of demand, taking into account historical trends, present competitive environment and anticipated future developments. Based on the 1988/1989 DG forecasts, Comsat notes that projected demand has increased substantially in nearly every service category.

9. In its supplement of October 12, 1991, Comsat provided updated traffic projections based on the 1990 DG Forecast. Comsat states that the 1990 data shows that projected demand for INTELSAT services has substantially increased above previous projections in nearly every major service category. In particular, Comsat notes that the traffic projections for Category A services[6] and video leases have shown substantial increases, more than 32% and 138%, respectively, since the 1988 DG Demand Forecast. According to Comsat, the anticipated large growth in demand for video services has greatly increased INTELSAT's estimated capacity requirements in international video leases. Comsat believes that these data amply demonstrate the need to maintain the current INTELSAT system configuration and require its participation in the procurement of the two INTELSAT VIIA satellites.

II. POSITIONS OF THE PARTIES

10. PAS states that the instant application to procure two INTELSAT VIIA satellites does not adequately consider the full potential impact of additional competitive capacity that will be available via separate satellite systems and fiber optic cables. If the forecasts are not justified, PAS fears that the excess capacity will be "dumped" into the market by a dominant, rate-based regulated firm and potential competitors will likely be deterred from market entry. PAS notes that this was the case with both the INTELSAT V and VI series satellites.

11. According to PAS, INTELSAT's forecasts suggest that competitive services--international video, IBS and domestic services--will be a significant and growing component of the INTELSAT system in the 1990's, even more significant than Category A (i.e. noncompetitive services), including Public Switched Network (PSN) services. Based on its analysis of trends in the INTELSAT system, PAS states that there will be a shift in the use of the system with the bulk of the INTELSAT system used for competitive services, many of which will be targeted for domestic users outside of the United States. PAS believes that this shift could have significant implications for U.S. policy as long as INTELSAT has a protected monopoly in satellite-based PSN services. PAS is concerned that the existence of INTELSAT's protected satellite-based PSN monopoly would put Comsat in a position to allocate costs among competitive and monopoly services in a manner that leads to cross-subsidization, with U.S. ratepayers essentially underwriting INTELSAT's provision of competitive services. PAS charges further that INTELSAT's monopoly position is likely to lead to distorted investment decisions. PAS notes that the current system protects Comsat from the risk that it will lose money while separate satellite systems take that risk with each of their investment decisions. To avoid U.S. ratepayers suffering the consequences of INTELSAT's and Comsat's mistakes, PAS believes that the Commission should open to competition the provision of PSN services via satellite facilities.

12. Comsat does not believe that PAS has identified anything in its comments to warrant a hearing or deferral of its application pending further proceedings. Comsat notes that INTELSAT forecasts do take into account competitive media. Moreover, Comsat does not see any grounds for questioning the U.S. separate systems policy merely because PAS asserts that the additional INTELSAT VII capacity will be used predominantly for competitive service offerings. Comsat points out that the separate systems policy contemplated that INTELSAT would continue to provide service in a growing video and private line market in competition with separate systems. Finally, with respect to PAS' contention regarding Planned Domestic Services (PDS), Comsat states that PDS is the second smallest of the four service components identified in its application in terms of projected utilization.

III. DISCUSSION

13. The only issue presented here is whether there is a need for the procurement of two INTELSAT VIIA satellites to replace existing satellites that will reach the end of design life in the AOR in the 1995/1996 time frame. In considering this issue, we analyze such factors as: (1) INTELSAT's nominal deployment plan; (2) assumptions regarding launch failures; and (3) traffic projections. As demonstrated herein, we conclude that Comsat's participation in the procurement of two INTELSAT VIIA satellites will be in the public interest.

A. INTELSAT's nominal deployment plan

14. In the *INTELSAT VII* order,[7] we examined INTELSAT's nominal 9+1(+3) configuration in great detail in considering the need to procure five INTELSAT VII satellites. We determined that the maintenance of each orbital location was required by the particular traffic and connectivity requirements that each satellite at that location accommodated. Based on the need to maintain the 9+1(+3) operational configuration, we authorized Comsat to participate in the procurement of five INTELSAT VII spacecraft. The primary need identified for the INTELSAT VII spacecraft was to replace existing satellites that would reach the end of design life. Initially, the plan called for two INTELSAT VII satellites to be deployed in the Pacific Ocean Region (POR) to replace the INTELSAT VA F-10 and F-11 satellites deployed at 174°E.L. and 177°E.L. respectively. A third INTELSAT VII was earmarked to replace the INTELSAT VA F-12 satellite located at 359°E.L. Two INTELSAT VIIs were authorized as spares in the event of launch or in-orbit failures. In the event that no launch failures of INTELSAT VI and INTELSAT VII satellites occurred, the two remaining INTELSAT VII satellites were to be deployed at the 307°E.L. and 342°E.L. orbital locations to replace INTELSAT VA F-13 and F-15 satellites that will reach the end of design life in the 1995/96 time frame.[8]

15. Subsequent to the *INTELSAT VII* order, Comsat was authorized to participate in the procurement of an all Ku-band satellite known as the INTELSAT K in order to meet near term requirements for video services in the AOR which could not be met either prior to or after the introduction of INTELSAT VII satellites in the AOR.[9] Thus, the 9+1(+3) configuration will be expanded by one

satellite, assuming the successful launch of the INTELSAT K in 1992. The record continues to support our previous findings with respect to the need to maintain the operational roles which form the basis of the 9+1(+3) operational configuration, as well as the need for the INTELSAT K and we reaffirm these findings.

B. Assumptions as to Launch Failure

16. In authorizing Comsat's participation in the procurement of five INTELSAT VII satellites, we did not find it unreasonable for INTELSAT to procure two spare satellites as insurance against launch failures. As discussed above, in the event that no launch failures of the INTELSAT VI or INTELSAT VII satellites occurred, the two spare INTELSAT VII satellites would be deployed at the 307^{0}E.L. and the 342^{0}E.L. orbital locations to replace INTELSAT VA F-13 and F-15 satellites.

17. One INTELSAT VI launch failure has already occurred. On March 14, 1990, the attempted launch of the second INTELSAT VI (F-3) was unsuccessful and the satellite was stranded in an unstable low earth orbit. Although the satellite was successfully reboosted on May 14, 1992, it must undergo extensive in-orbit testing for a period of four to eight weeks to determine the effects of being stranded in an unstable low earth orbit for over two years. This reboost represents the first time such a mission has been undertaken. In the event the satellite fails to operate properly, one of the two previously authorized INTELSAT VII satellites will be deployed to the orbital slot designated for the INTELSAT F-3, leaving only one INTELSAT VII to serve as protection against a failure in the upcoming seven launches (the INTELSAT K, four INTELSAT VIIs and two INTELSAT VIIAs). In the subject application and its supplements, Comsat proposes to procure the INTELSAT VIIAs as replacements for the satellites at 307^{0}E.L. and 342^0 E.L. and to maintain the second contingent INTELSAT VII as a spare to protect against launch failures in the upcoming seven launches. Therefore, we find that the two INTELSAT VIIAs are required to maintain the 9+1(+3) operational configuration. In the event the reboost attempt and all of the remaining launches are successful, INTELSAT will have two spare INTELSAT VIIs to take into account for future procurement decisions.

C. Traffic Projections

18. As set forth above, we have determined that Comsat's participation in the procurement of two INTELSAT VIIAs is required to replace existing satellites at 307^{0}E.L. and 342^{0}E.L. which will reach the end of design life in the 1995/1996 time frame. When viewed in this context, traffic projections are not as significant as they would be were additional satellite roles being established based on forecasted demand. Nonetheless, traffic projections could influence a decision whether to replace satellites reaching the end of their design lives. As noted below, the projected demand clearly supports the maintenance of INTELSAT's current operational configuration.

19. The traffic projections furnished by Comsat compare INTELSAT's traffic projections for the year 1999 based on the 1988, 1989 and 1990 DG Forecasts. The 1990 DG Forecast shows general increases above the earlier DG Forecasts in every ocean region for all services, with the exception of IBS. Specifically, the traffic data show the total percentage difference in projections based on a comparison of the 1990 and 1988 DG Forecasts. In the AOR, the 1990 DG Forecast projects a 20.9% increase in Category A services, a 128.8% increase in video leases, a 31.6% decline in IBS and a 30.7% decline in domestic services.[10] These totals indicate that there is an increasing demand for Category A and video services. These projections also further support the need for the maintenance of INTELSAT's nominal deployment plan.

20. PAS is concerned that INTELSAT's traffic projections do not take into account the additional capacity available over competitive separate satellite systems and fiber optic submarine cables. PAS fears that if the forecasts are not justified: 1) Comsat will be in a position to subsidize competitive services with revenues from monopoly services to the detriment of U.S. ratepayers; or 2) the excess capacity will be dumped into the market which could deter potential competitors from market entry. To guard against the risk of mistakes in the traffic projections, PAS asserts that the Commission should open the satellite-based PSN market to competition.

21. In light of recent developments, PAS' concern about the restriction on separate international satellite systems appears to be moot. After its review of the PSN restriction on separate international satellite systems, the Executive Branch informed the Commission on November 27, 1991 of its goal to eliminate the PSN restriction prohibiting interconnection of separate international satellite systems to the public switched network.[11] The Commission also established a sunset date of January 1, 1997 for the complete elimination of the PSN restriction.[12] As an immediate measure, the Executive Branch established modified criteria which would permit private lines provided over a separate system to be interconnected with the PSN.[13] In an order released April 8, 1992, the Commission implemented the modified criteria set forth by the Executive Branch.[14] Currently, the Commission has before it an application filed by PAS[15] requesting modification of its licenses to reflect the modified criteria set forth by the Executive Branch.

22. The question of the accuracy of INTELSAT's traffic projections has been considered previously. In the *INTELSAT VII* order, we noted that INTELSAT had taken steps to minimize the risk of excess capacity resulting from overstated traffic projections. In the past, INTELSAT procurement decisions were based only on the User Forecast generated at the GTM. The User Forecast tended to overestimate traffic demand and, as in the case of the INTELSAT VI series, this forecast resulted in excess capacity when projected growth did not materialize. INTELSAT's decision to procure the INTELSAT VII series represented the first time INTELSAT provided two sets of projections in order to gauge more accurately the impact of various factors on traffic projections. The DG Forecast was established specifically to counterbalance the User Forecast generated at the GTM, which had proved, in the past, to be overly optimistic. Based on the forecasts submitted in support of the INTELSAT VII procurement, we noted that the wide disparity in the DG and User Forecasts for the AOR was a clear indication of INTELSAT's concern with both the potential for overprojection and the reliance on overstated projections as a basis for major procurement decisions. Moreover, in comparing traffic projections with actual usage for year-end 1987 and 1988, we found the DG Forecast more reliable than the User Forecast; the DG Forecast proved to be conservative with respect to Category A services and extremely accurate with respect to Category B services.

23. Given the speculative nature of traffic projections in general, and more specifically INTELSAT's need to rely on the projections of its member countries, we believe that INTELSAT has made a reasonable effort in recent years to improve its forecasting. It appears that the forecasts provided by Comsat in the context of this application provide some indication that INTELSAT has improved its forecasting. In particular, the 1990 DG Forecast shows a decline of 31.6% for IBS compared to the 1988 DG Forecast. Although PAS cites the variability of the forecasts as cause for concern, it is reasonable to assume that the projected decline in IBS is INTELSAT's attempt to take into account the increased competition it currently faces and the fact that competition will increase in the coming years.

24. Moreover, INTELSAT has the incentive to try to forecast accurately if it is to compete with optical fiber submarine cables and other satellite systems that have come into existence recently. Indeed, the current competitive environment with respect to fiber optic submarine cable facilities and separate satellite systems would seem to argue against PAS' concern that INTELSAT's satellite-based monopoly in the provision of PSN services could lead to cross-subsidization of competitive services. In particular, the demand for digital fiber optic submarine cable facilities continues to increase, causing carriers to acknowledge the demands of their customers in procuring new facilities. Recent applications for such facilities suggest a trend among users to have digital fiber optic submarine cable facilities restored with similar facilities in the case of an outage.[16] With carriers placing increased emphasis on such facilities, it is doubtful that INTELSAT's satellite-based monopoly in the provision of PSN could form the basis for the type of cross-subsidization of competitive services that PAS fears.

25. We are also unpersuaded by PAS' argument that overstated INTELSAT projections could lead to the dumping of capacity which might discourage new entrants. In authorizing private cable and satellite systems, we made clear that such undertakings were risk ventures and would succeed or fail on their own merits without any guarantee of common carrier usage. Thus, these entities were keenly aware of competitive realities and the fact that common carrier systems would continue to be planned despite the existence of private systems. We would also note that past overstated INTELSAT traffic projections and INTELSAT's resulting use of excess capacity for domestic services has neither precluded PAS from planning upgrades to its existing system nor discouraged the prospective entry of other separate satellite system providers, such as Orion and Columbia.

D. The Role of PDS in the INTELSAT System

26. PAS has noted its concern that INTELSAT's satellite base monopoly could present problems particularly since an increasingly large component of the INTELSAT system will be used for competitive services. Although this concern is couched in terms of competitive services in general, it appears that PAS is primarily concerned with the prospect of increased use of INTELSAT for PDS. With respect to non-PDS competitive services, we note that the separate systems policy contemplated competition in this service category. Therefore the apparent shift in the usage of the INTELSAT system in the direction of competitive services is not a basis in itself for revisiting the separate systems policy.

27. On several occasions we have stated that PDS, as a secondary service, should be independently viable[17]; this is to ensure that U.S. ratepayers, who generally do not utilize INTELSAT-provided domestic capacity, are not subsidizing a service for which they have little use. However, while recognizing this concern, we have also been mindful of international comity considerations. In authorizing Comsat's participation in the INTELSAT VII procurement, we noted that the continuation of the nominal 9+1(+3) configuration was reasonable in light of the specific international purpose served by each of the satellites. Although we recognized that there may be some PDS on some of the satellites, in particular the satellite located at 359^{0}E.L., it did not alter our conclusion that Comsat should participate in the INTELSAT VII procurement.[18] We also recognized that the 359^{0}E.L. orbital location is important to U.S. interests because of national security concerns and connectivity with the IOR.

28. Having recognized that PDS is a component of the INTELSAT system, PAS has not provided any reasons which would warrant a deferral of the instant application, other than its fears that an increasing portion of the INTELSAT system's capacity will be used for PDS. The traffic projections submitted do not, however, support PAS' concern. Comsat notes that PDS constitutes the second smallest of the four categories of INTELSAT service. Comsat's traffic projections indicate that in the AOR, where the two INTELSAT VIIAs will be deployed, the DG Forecast projects a 30.7% decline in domestic services. Although this decline is due in part to the redistribution of PDS demand between the AOR and the IOR, there has not been any increase in projections in this service between the 1988 and 1990 DG Forecasts in the AOR and the IOR. The 1988 DG Forecast projected a combined demand of 247 Units for PDS for the AOR and IOR while the 1990 DG projected the combined demand for the AOR and IOR at 222 Units, a decrease of 25 Units. With respect to all ocean regions, the demand projected in the 1990 DG Forecast exceeds the demand expressed in the 1988 DG Forecast by only 2 Units. We will continue to monitor the situation with respect to PDS pricing issues and here reaffirm that such issues should be reviewed in the context of the instructional process.[19]

IV. MISCELLANEOUS ISSUES

29. Originally, PAS requested the Commission to set the subject application for a hearing or defer action until the issues raised by PAS, as discussed above, can be explored thoroughly in further FCC proceedings.[20] In light of PAS' subsequent statement that it does not seek to deny Comsat's application,[21] it is not entirely clear whether PAS has withdrawn its request for deferral or a hearing. Therefore, we choose to address below the issue of PAS' request for a hearing.

30. Upon completion of our review of PAS' request, we deny PAS' request for a hearing to resolve the issues discussed above. A party challenging an application by means of a petition to deny and who seeks an evidentiary hearing must satisfy a two-step test. *Astroline Communications Company Limited Partnership v. Federal Communications Commission*, 857 F.2d 1556 (D.C. Cir. 1988). As a threshold matter, the petition must contain "specific allegations of fact sufficient to show . . . that grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." The Commis-

sion must proceed on the assumption that the specific facts set forth in the petition are true. In so assuming, and if finding that the petitioner has alleged a *prima facie* inconsistency with the public interest, thereby satisfying the threshold analysis, the Commission must determine then whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice, a substantial and material question of fact is presented."

31. Having fully considered PAS' comments and related pleadings, we find that PAS has failed to satisfy the two-step test. PAS' request for a hearing is based on its suspicion that INTELSAT's traffic projections may be overstated which then could lead to the "dumping" of excess capacity and deter competitors from market entry.[22] PAS also expresses concern that an increase in the use of the INTELSAT system for competitive services could lead to the cross-subsidization of competitive services with the revenues from satellite-based monopoly services. In assuming PAS' allegations to be true for purposes of the threshold analysis above and, in so doing, assuming that the grant of this application would be *prima facie* inconsistent with the public interest, we must determine whether a substantial and material question of fact is presented. Therefore, we conclude that no substantial and material question of fact is presented based on our review of the application, the pleadings filed and other matters noted above in our analysis of these issues (*see generally supra* paras. 13-28).

32. PAS notes that once again Comsat has failed to file complete information on the proposed procurement in a manner that gives the public an adequate opportunity to comment in advance of the INTELSAT meeting where the final decision on the procurement will be made. The instant application was filed on January 11, 1990, at which time Comsat took no position on the procurement. Although Comsat filed its supplement on October 12, 1990, PAS points out that at that time Comsat had not yet filed "all technical, operational, financial and other details of the final proposal" as required by the Commission's 1974 Policy Statement.[23] Instead of providing such information, PAS states that the supplement consisted of three scenarios or options that were significantly different from each other in terms of technical and operational ramifications.

33. We agree with PAS that the application did not strictly comply with the Commission's procedural policy, which requires that a completed application be filed at least 60 days before anticipated board action. However, we have recognized that the purpose of policy statements is "to allow agencies to announce their 'tentative intentions for the future' . . . without binding themselves." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *citing Pacific Gas & Electric v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).[24] In this situation, although we lacked 60 days to analyze Comsat's full application prior to the Board of Governors' decision, no harm has resulted. Our decision to approve Comsat's application is not based on the fact that INTELSAT had already committed to purchase the satellite. Furthermore, there was sufficient time following the Board of Governors' decision to review the application, including the policy and economic issues cited by PAS.[25]

V. CONCLUSION AND ORDERING CLAUSES

34. As set forth above, the procurement of two INTELSAT VIIA satellites to replace existing satellites, approaching the end of design life, in the AOR is reasonable. Under these circumstances, we conclude that Comsat's participation in the procurement of two INTELSAT VIIA satellites will serve the public interest.

35. Accordingly, IT IS ORDERED that application File No. CSS-90-001 IS GRANTED in part and DEFERRED in part, and Comsat is authorized, pursuant to Section 201(c) of the Communication Satellite Act of 1962, as amended, 47 U.S.C. § 721(c) and Sections 214, 308, and 319 of the Communications Act of 1934, as amended 47 U.S.C. §§ 214, 308, and 319, to participate in INTELSAT's procurement of two INTELSAT VIIA satellites to be deployed in the AOR in the 1995/1996 time frame for the replacement of existing satellites that will reach the end of design life.

36. IT IS FURTHER ORDERED that a decision concerning the procurement of appropriate launch vehicles for the INTELSAT VIIAs is deferred and will be the subject of a future Commission order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In light of INTELSAT's Board of Governors decision to defer consideration of any recommendations the Director General may have on the procurement of the launch and associated vehicles for the INTELSAT VIIAs, we take no decision here on the issue of procurement of appropriate launch vehicles for the INTELSAT VIIAs. *See* Further Supplement to Application at 4.

[2] PAS asserts that its February 16, 1990 Comments were analogous to a petition to deny, entitling it to file reply comments in response to Comsat's Opposition. On February 22, 1991 PAS refiled its previously submitted Comments in response to Comsat's further supplement of January 28, 1991.

[3] *See infra* paragraph 6 for a description of the ATM-4H design option.

[4] The nominal 9+1(+3) configuration consists of nine operating satellites, one dedicated system spare and three satellites in inclined orbit residual roles. Inclined orbit satellites are those satellites that have reached the end of design life or are otherwise impaired by the lack of fuel.

[5] *See* October 12, 1990 Supplement to Application, p.5.

[6] "Category A" services include voice-grade services such as Frequency Modulation (FM), Time Division Multiple Access (TDMA) and Intermediate Data Rate (IDR). "Category B" services include INTELSAT Business Services (IBS) and video.

[7] Communications Satellite Corporation, 5 FCC Rcd 753 (1990) (*INTELSAT VII* order). INTELSAT's procurement of additional satellites throughout the 1990's is based on this 9+1(+3) nominal configuration.

[8] *See INTELSAT VII Order*, 5 FCC Rcd at 761.

[9] The INTELSAT K has twenty-four 36-MHz transponders. This satellite is in addition to the 9+1(+3) configuration used by INTELSAT for planning decisions. *See* Communications Satellite Corporation, 5 FCC Rcd 5952 (1990).

[10] Comsat notes that the decline in domestic leases results, in part, from the redistribution of traffic between the AOR and the POR. Overall, the projected demand for domestic services in all ocean regions has increased from 253 units in the 1988 DG Forecast to 255 units in the 1990 DG Forecast.

[11] *Permissible Services of U.S. licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT)* (*Separate Satellite Systems* order), 7 FCC Rcd 2313 (1992). Petition for Reconsideration of Separate Satellite Systems order, filed on May 8, 1992, by James R. Hobson, File No. ISP-92-006.

[12] The Executive Branch set forth the results of its review in a joint letter, dated November 27, 1991, issued by Secretary of State James A. Baker, III, Department of State and Secretary of Commerce Robert A. Mosbacher, Department of Commerce to the Honorable Alfred C. Sikes, Chairman, Federal Communications Commission.

[13] In response to the Executive Branch's modified criteria, PAS withdrew its petition for Rule Making requesting the complete elimination of the PSN restriction.

[14] Specifically, "separate satellite systems shall be permitted to provide through the sale or lease of transponders or space segment capacity: 1) all services not interconnected with the public switched network (including private line services and video and audio transmission services); 2) emergency restoration services; 3) up to 100 64-kilobit-per-second equivalent circuits interconnected with the public switched networks for the provision of switched international telecommunications services; and 4) interconnected private line circuits." *See Separate Satellite Systems* order, supra at n.11.

[15] File No. CSS-84-004-P-(M).

[16] Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the United States, Germany and the Netherlands (TAT-10), FCC 91-417 (released January 13, 1992); Joint Application for a License to Land and Operate a High Capacity Digital Submarine Cable System Extending Between the United States, France and the United Kingdom (TAT-11), FCC 91-419 (released January 10, 1992).

[17] *See INTELSAT VII* order, 5 FCC Rcd at 760.

[18] *See INTELSAT VII* order, 5 FCC Rcd at 761.

[19] The instructional process is the process by which the U.S. Government gives instructions to the U.S. Signatory (Comsat) with respect to INTELSAT actions. We have used the instructional process on several occasions to discuss our concerns over PDS pricing. For full history, *see INTELSAT VII* order, 5 FCC Rcd at 763, fn.38.

[20] *See* PAS' Comments, p.2-3 (February 12, 1990).

[21] *See* PAS' Comments, p.2 (December 12, 1990).

[22] PAS' concerns regarding overstated INTELSAT traffic projections are based on previous incidences, prior to the establishment of the DG Forecast, where projections were based solely on the User Forecast generated at the GTM (*see supra* para. 22).

[23] 46 FCC 2d 338, 339 (1974).

[24] *See* Communications Satellite Corporation, 5 FCC Rcd at 5956.

[25] *See INTELSAT VII Order,* 5 FCC Rcd at 761 (approving Comsat application filed less than 60 days before Board of Governors' decision).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

SBM COMMUNICATIONS, INC.	File No. BPH-880816MM
HEIDI DAMSKY	File No. BPH-880816MW
GEORGE W. BARBER, JR.	File No. BPH-880816MY
GEORGE I. O'REAR	File No. BPH-880816NL
WEDA, LTD.	File No. BPH-880816NR
Willie Huff, Deborah Huff and Adrienne E. Lee, A Partnership d/b/a HOMEWOOD PARTNERS	File No. BPH-880816NU
HOMEWOOD COMMUNITY BROADCASTERS, LTD.	File No. BPH-880816OQ

For a Construction Permit
for a New FM Station,
Channel 247A,
Homewood, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1992; Released: June 3, 1992

By the Commission:

1. Before the Commission for consideration is a decision of the Review Board denying the appeal filed by Homewood Community Broadcasters, Ltd. (HCBL) from Administrative Law Judge Joseph Chackin's *Memorandum Opinion and Order*, FCC 91M-2576 (Aug. 19, 1991), dismissing its application.[1] We agree with the Board's resolution of this case.

2. Initially, we note that HCBL did not file its appeal of the ALJ's ruling in a timely manner, 6 FCC Rcd 6485 n.1, and that the Mass Media Bureau argues that HCBL's untimeliness in appealing the ALJ's ruling is sufficient grounds for rejection of HCBL's application for review. Given the untimeliness of HCBL's appeal to the Board and the attendant lack of good cause, it is clear that there would be a sound reason for denial of HCBL's application for review without further consideration. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157 (1991). In this regard, while we believe that the Board followed the preferable practice in addressing the merits of HCBL's appeal in its order, we wish to make clear that we will not hesitate to summarily dispose of such procedurally deficient matters where circumstances warrant such actions in the future. Nonetheless, we wish to comment on certain matters.

3. HCBL's application was found to be tenderable by the staff of the Mass Media Bureau and designated for hearing even though it contained only an electronically transmitted facsimile signature, instead of an original signature. *See Leibensperger FM, Inc.*, 6 FCC Rcd 708 (M.M. Bur. 1991). Two months after designation, a competing applicant filed a motion to dismiss HCBL's application, arguing that the facsimile signature constituted a tenderability defect under the Commission's "hard look" processing rules. *See Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (Oct. 24, 1985), *aff'd without published opinion sub. nom Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).[2] The ALJ held in abeyance his decision on the motion to dismiss because the Commission was separately considering whether applications filed with facsimile signatures complied with the "hard look" tenderability requirements.

4. The Commission thereafter determined that, in four separate proceedings, the Mass Media Bureau staff had properly dismissed applications, which, at the close of each respective filing window, contained only facsimile signatures instead of handwritten signatures. The Commission found that applications for new FM service filed with facsimile signatures do not contain an original signature, as required by 47 C.F.R. § 73.3513 and FCC Form 301, the application for a new FM construction permit, and that an application containing only a facsimile signature is defective and cannot be granted. Further, the Commission held that, under the "hard look" rules, applications containing facsimile signatures are not eligible for processing and cannot become eligible by an amendment supplying an original, handwritten signature submitted after the close of the filing window. The Commission explained that the original signature requirement provides assurance that the applicant has personally reviewed the application and can be held responsible for the truthfulness and accuracy of the application. *Mary Ann Salvatoriello*, 6 FCC Rcd 4705, 4706-07 ¶¶ 8-15 (1991).

5. The ALJ subsequently dismissed HCBL's application pursuant to the Commission's decisions in *Salvatoriello* and *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990). The ALJ observed that in *Salvatoriello*, the signature defects were detected by the staff prior to designation and the defective applications were summarily dismissed, whereas the staff inadvertently designated HCBL's application for hearing even though it contained a facsimile signature and was therefore untenderable. However, the ALJ found that, notwithstanding the staff's error, HCBL's application must be dismissed since in *Pueblo*, the Commission affirmed the dismissal of an application that the staff had inadvertently designated for hearing even though it violated antenna height limitations specified in a treaty between the United States and Mexico. *See* FCC 91M-2576 (Aug. 19, 1991).[3]

6. The Board affirmed HCBL's dismissal. The Board, citing its opinion in *George Henry Clay*, 5 FCC Rcd 317, 318 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 2997 (1990), reiterated its determination that the "hard look" processing rules are intended to be applied only during *initial* staff processing. Nonetheless, the Board found that, under *Salvatoriello*, HCBL's application is not grantable because it does not contain a cognizable original signature.

Furthermore, the Board noted that HCBL had not attempted to amend its application and expressed doubt as to whether HCBL would be able to make a showing of due diligence if it did seek to amend its application with an original signature at this late date. *SBM Communications, Inc.*, 6 FCC Rcd 6484 (Rev. Bd. 1991).

7. HCBL now asserts that no amendment was required because its application contains a cognizable signature which can be used to determine whether its general partner signed the application. HCBL contends that it filed an amendment on March 7, 1991, as well as an Integration and Diversification Statement on March 4, 1991, both of which contain the original signature of its general partner, which may be compared with the facsimile signature in the application originally filed. HCBL also argues that, under *Clay*, its failure to file an application with an original signature should be considered a minor ministerial error which has been corrected by the subsequent amendments to its application, especially in view of equitable considerations, *e.g.*, the failure of the staff to detect the error in its application, its payment of the hearing fee, and its active participation in the hearing process.

8. The Mass Media Bureau and Homewood Partners, Inc. (Partners) oppose HCBL's application for review. The Bureau contends that HCBL's failure to file an application containing an original signature is fatal because an untenderable application cannot be cured by a post-designation amendment. Partners points out that it had filed a separate motion to dismiss HBCL's application for failure to prosecute based on HBCL's refusal to participate in discovery. The ALJ dismissed Partners' motion as moot after dismissing HBCL's application because of the signature defect. Nevertheless, Partners argues that HCBL's failure to prosecute its application provides an independent basis for dismissal.[4]

9. *Salvatoriello* specifically holds that an application "containing only an electronically produced copy of a signature is defective and cannot be granted," citing *Jane A. Roberts*, 29 FCC 141 (1960), for the proposition that applications with signature defects are insufficient for grant without amendment. Because HCBL's application, as filed, contains only a facsimile signature, and HCBL failed to submit an amendment correcting the signature defect before the filing window closed, HCBL's application may be dismissed notwithstanding the staff's error in designating the application for hearing. *See Amor Family Broadcasting Group*, 918 F.2d 960, 962 (D.C. Cir. 1990); *Pueblo*, 5 FCC Rcd at 6278-79 ¶ 5.

10. HCBL's application, as filed, and the certification in the application that information contained therein was true and complete, has only a facsimile signature. This defect does not constitute a minor ministerial error which was corrected by virtue of HCBL's subsequent post-designation filings. As the rules for processing FM applications make clear, defective applications, *e.g.*, those not in accordance with FCC rules, are subject to dismissal. *See* 47 C.F.R. §§ 73.3566 and 73.3564(b). Consequently, in order to cure the signature defect as a matter of right, HCBL should have filed an amendment supplying the original signature required by the Commission's rules by the close of the filing window. To correct the defect after designation for hearing, HCBL was required to make a good cause showing in light of the "hard look" rules and 47 C.F.R. § 73.3522(b)(1).[5]

11. HCBL's application contains a post-designation amendment informing the Commission of a change in its general partner's address, as well as an integration and diversification statement, both of which contain the original signature of HCBL's general partner. However, neither the amendment nor the integration and diversification statement purport to show good cause to correct the signature defect or affirm that, on the date that HCBL's application was signed, the applicant certified as to the completeness and accuracy of the information contained in the application. In light of the clear deficiency in HCBL's application under the tenderability requirements of the "hard look" rules, *Salvatoriello*, 6 FCC Rcd at 4706 ¶ 8, and its failure to make any other showing in accordance with 47 C.F.R. § 73.3522(b)(1), we conclude that there is no good cause for further consideration of HCBL's proposal. Under these circumstances, HCBL's application was properly dismissed.[6]

12. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed December 5, 1991 by Homewood Community Partners, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) an application for review filed December 5, 1991 by HCBL; (2) an opposition to the application for review filed December 20, 1991 by the Mass Media Bureau; and (3) an opposition to the application for review filed December 23, 1991 by Homewood Partners, Inc.

[2] The "hard look" order and processing rules are reprinted at 58 RR 2d 776 (1985). Appendix D to the "hard look" order, which contains the tenderability criteria, *i.e.*, items which must be included in the application for that application to be deemed substantially complete and therefore sufficient for tender, is reprinted at 58 RR 2d 166 (1985).

[3] In summarizing the ALJ's decision dismissing HCBL's application, the Board erroneously characterized the defect at issue in *Pueblo*, the applicant's violation of an antenna height limitation in a treaty between the United States and Mexico, as a tenderability defect. In fact, although this error has no legal significance here, the applicant's specification of a tower height in excess of the treaty's limitations was an acceptability defect. *See Pueblo*, 5 FCC Rcd at 6278 ¶¶ 2, 4. For an explanation of the processing of FM applications, including a discussion of the items considered during the separate tender and acceptability reviews conducted by the staff, see *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 ¶¶ 3-6 (1991).

[4] In light of our action herein on HCBL's Application for Review, we agree with the ALJ that no further consideration of Partners' contentions is warranted.

[5] In *George Henry Clay*, 5 FCC Rcd 317, 318 ¶ 4 (Rev. Bd. 1990), which was not reviewed by the Commission, the Review Board asserted that the "hard look" rules are "legally immaterial" at the post-designation stage of an adjudicatory proceeding. However, in *Pueblo*, 5 FCC Rcd at 6279 ¶ 6, we stated that the

policy and precedent associated with the "hard look" rules necessarily affect the good cause analysis of any post-designation petition for leave to amend a deficient application. Thus, we agree with the Bureau that any post-designation attempt to cure either tenderability or acceptability defects must be analyzed in light of both pertinent "hard look" requirements and ordinary good cause considerations in order to avoid undermining the benefits of the "hard look" policy. *Id.* Consequently, we specifically disavow the Board's holding in *Clay*. Amendments perfecting the tenderability or acceptability of an application after designation for hearing require a showing in light of both the "hard look" rules and the good cause requirements of 47 C.F.R. § 73.3522(b)(1). *See Pueblo*, 5 FCC Rcd at 6278-79 ¶¶ 5-6.

[6] The Commission has recently proposed to modify the hard look processing guidelines to provide more lenient standards for amendment and acceptance of defective applications for new FM broadcast service. *See Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991)(Proposed Notice of Rule Making). Under the approach suggested by the Commission in this Rule Making, applicants would be given a limited opportunity to amend tenderability and acceptability defects. *Id.* at ¶ 24. However, the Commission has specifically stated that the proposed changes are not intended to be applied to currently pending applications and appeals. *Id.* at ¶ 34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-2

In re Applications of

DRY PRONG EDUCATIONAL BROADCASTING FOUNDATION — File No. BPED-900305MF

For Modification of
Noncommercial Station KVDP(FM),
Dry Prong, Louisiana

MISSIONARY ACTION PROJECTS — File No. BPED-900905MK

For Construction Permit for a
New Noncommercial FM Station
on Channel 210 in
Alexandria, Louisiana

Appearances

A. Dale Smith for Missionary Action Projects; *F. Joseph Brinig* for Missionary Action Projects; and *Robert Zauner* for the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: May 26, 1992; Released: June 5, 1992

1. Under consideration are the Motion to Dismiss, filed May 11, 1992 by Dry Prong Educational Broadcasting Foundation and Motion for Summary Decision, filed May 14, 1992 by Missionary Action Projects.

2. Dry Prong Educational requests that its application be dismissed. Its request will be granted.

3. Missionary Action requests that summary decision be granted on issue 1, whether it is a qualified noncommercial educational FM licensee. In light of Missionary Action's showing, the Mass Media Bureau supports a grant of summary decision. Missionary Action has listed educational needs of the community and has promised to continue to ascertain those needs. It has also provided a list of sample programs to meet the educational needs of Alexandria, Louisiana. There are no outstanding questions of fact on this issue and summary decision will be granted. The public interest will be served by granting Missionary Action's application.

ACCORDINGLY, IT IS ORDERED that the Motion to Dismiss, filed May 11, 1992 by Dry Prong Educational Broadcasting Foundation IS GRANTED and its application (File No. BPED-900305MF) IS DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the motion for summary decision, filed May 14, 1992 by Missionary Action Projects IS GRANTED.

IT IS FURTHER ORDERED that the application of Missionary Action Projects (File No. BPED-900905MK) for a construction permit for a new FM noncommercial station to operate on Channel 210 in Alexandria, Louisiana IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-580

In re Applications of

SAFE BROADCASTING CORPORATION — File No. BPH-871022MC

TRI-STATE BROADCASTING COMPANY — File No. BPH-871023MJ

For Construction Permit for
New FM Station, Channel 239A
Trion, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 1992; Released: June 3, 1992

By the Commission:

1. We have before us an application filed on December 13, 1991 by Safe Broadcasting Corp. for review of the Decision of the Review Board in this case, *Safe Broadcasting Corporation*, 6 FCC Rcd 6548 (Rev. Bd. 1991), and a contingent application for review of the same decision filed by Tri-State Broadcasting Company (hereinafter TBC) on December 12, 1991.[1]

2. In an initial decision, 5 FCC Rcd 381 (ALJ 1990), the presiding ALJ held that TBC is superior to Safe under the standard comparative criteria. Safe filed exceptions, but without considering those the Board remanded for further hearing under two issues: first, to determine whether TBC had violated 47 C.F.R. §73.3526 in its preparation and maintenance of "issues/programs" lists in the public-inspection file of its existing AM station, WGTA, Summerville, Georgia, and second, to determine whether it made intentional misrepresentations to the Commission in placing the lists in that file and in later filing copies with the Commission as evidence that WGTA's programming had been unusually good. The ALJ resolved both remand issues in TBC's favor in a supplemental initial decision, 6 FCC Rcd 5227 (ALJ 1991), finding that TBC's owner had admitted negligence and made mistakes, but ultimately concluding both that TBC had made a good faith effort to identify significant needs of its community and service area and that there was no evidence that TBC had engaged in intentional deception concerning its issues/programs lists. Safe then filed further exceptions. In the decision now under review, the Board affirmed both initial decisions and denied Safe's exceptions. Safe argues in its application for review that the ALJ and the Board should have disqualified TBC in light of the evidence taken at the remand hearing. Further, Safe contends that it should prevail even if TBC is not disqualified, based on local residence and civic activities and the assertedly meritorious broadcast record of its existing station, WSAF, Trion, Georgia. We agree with the Board's resolution of this case. Two matters warrant further brief comment.

3. Safe maintains, *inter alia*, that the ALJ and the Board should have concluded that TBC "manufactured" certain issues/programs lists long after the time periods to which they pertain, referring to annual lists for the years from 1976 to 1980 that TBC submitted to the ALJ in support of a motion for addition of a meritorious programming issue. Safe argues that TBC could not possibly have prepared those lists at the ends of each of those years because the Commission did not announce that issues/programs lists would be required until 1981. The premise of this argument is false. In fact, the Commission first announced early in 1976 that all broadcast licensees would have to prepare such lists annually for placement in their public-inspection files and for submission with renewal applications. *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418, 419 (1976), modified in other respects, 61 FCC 2d 1 (1976). Thus, Safe's argument in this vein is baseless.

4. Safe's contention that it deserves credit for its past programming is also unpersuasive. The ALJ gave two sufficient reasons for rejecting Safe's proffered evidence of meritorious programming: he held that it fell short of the requisite threshold because it lacked information as to the duration, frequency, or types of programming intended to meet particular problems and also because it did not afford enough information on the programming of other stations to allow objective comparison. FCC 89M-1471, rel. May 17, 1989. Safe's argument to the contrary is merely conclusory and fails to establish that it made a prima facie showing of an unusual attention to the public's needs and interests or a special sensitivity to changing needs through flexibility of programming, as required by the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965).

5. ACCORDINGLY, IT IS ORDERED that the application for review filed by Safe Broadcasting Corp. on December 13, 1991 IS DENIED; that the contingent application for review filed by Tri-State Broadcasting Co. on December 12, 1991 and the motion to strike filed by Tri-State Broadcasting Co. on February 6, 1992 ARE DISMISSED as moot in light of our action on Safe's application for review and that the grant of the application of Tri-State Broadcasting for a new FM station on Channel 239A at Trion, Georgia, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] TBC filed an opposition to Safe's application for review on December 26, 1991. Safe filed an opposition to Tri-State's contingent appplication for review on December 24, 1991. In conjunction with the latter pleading, Safe filed a statement for the record on January 16, 1992. TBC filed a motion to strike the statement for the record on February 6, 1992, and Safe filed an opposition thereto on February 18, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
JAMES EVANS	File No. BPH-851231MR

For Construction Permit for
New FM Broadcast Station at
Montecito, California

ORDER

Adopted: May 22, 1992; Released: June 3, 1992

By the Commission:

1. In a Memorandum Opinion and Order released on April 15, 1992, FCC 92M-460, ALJ Walter C. Miller approved a settlement agreement between two of the three remaining applicants for a permit for a new FM station in Montecito, California and consequently dismissed the application of Ellwood Beach Broadcasting, Ltd. As he had previously issued a notice of potential forfeiture liability in the amount of $25,000 against Ellwood Beach, Judge Miller forwarded the dismissal order as required by 47 C.F.R. §1.80(g)(3) so as to alert the Commission to the unresolved forfeiture issue.

2. The ALJ's notice of potential forfeiture liability charged Ellwood Beach with possible violation of 47 C.F.R. §1.65 (duty to report material changes of circumstance), §1.17 (duty to submit truthful written statements), and §73.1015 (prohibition of, *inter alia*, misrepresentations and willful material omissions in applications). Judge Miller indicated that he was issuing the notice because a substantial and material question had been raised as to whether Ellwood Beach had lost its proposed transmitter site on Dec. 31, 1990 and whether its general partner had deceitfully refrained from reporting that change of circumstance for fourteen months thereafter.

3. Although Ellwood Beach represented in its application that it then had reasonable assurance of access to a transmitter site, there is no allegation that this representation was false when it was made. In this regard, Judge Miller did not allude in the notice or in the accompanying opinion to any allegation that Beach had submitted written statements that, when filed, were false or contained material omissions, nor did he identify the dates on which any such violation allegedly occurred. It is not apparent, then, that there is justification for further consideration of the charges that Ellwood Beach violated §1.17 or §73.1015. It appears that further consideration is warranted, however, with respect to the charge that Beach violated §1.65 with intent to deceive.

4. ACCORDINGLY, IT IS ORDERED, pursuant to 47 C.F.R. §1.80(g)(3) and (f)(3), that, unless Ellwood Beach, within 30 days of the release date of this document, remits $25,000 payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-74821, the Commission will issue a determination pursuant to §1.80(f)(4) regarding forfeiture liability and, further, that Beach may file a response pursuant to 47 C.F.R. §1.80(f)(3) within that same period of time to show that a forfeiture penalty should not be imposed or that a forfeiture in a lesser amount should be imposed instead.

5. IT IS FURTHER ORDERED that the Secretary of the Commission SHALL SEND a copy of this Order by **Certified Mail-Return Receipt Requested to:**

Dana M. Hall
19966 Tracey Court
Canyon Country, California 91351.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-552

In the Matter of

Amendment of Section 73.202(b), RM-7331
Table of Allotments,
FM Broadcast Stations.
(Monterey, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 18, 1992; Released: June 4, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Manna Broadcasting Company, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6958 (1990), proposing the allotment of Channel 284A to Monterey, Tennessee. Petitioner filed comments stating its intention to apply for channel, if allotted. Mountaintop Broadcasters, Inc. ("Mountaintop"), permittee of Station WEGE-FM, Channel 273A, Crossville, Tennessee, filed comments.[1] Joe B. Wilmoth, successor-in-interest to petitioner, filed a letter and reply comments. Wilmoth then filed a request for withdrawal of his petition for rule making.

2. Wilmoth states that he is now the licensee of Station WKXD-FM, Channel 296A, Monterey, Tennessee.[2] As such, he notes that he is precluded from applying for Channel 284A at Monterey by Section 73.3555 of the Commission's Rules, and that he no longer supports allotment of the channel.

3. Wilmoth's withdrawal request was filed before the Commission modified its multiple ownership rules.[3] Nevertheless, Wilmoth has stated that he is no longer interested in applying for the channel, and no other party has expressed an interest in Channel 284A at Monterey. Therefore, in accordance with Commission policy, we will grant Wilmoth's request for withdrawal of his rule making proposal.

4. Accordingly, IT IS ORDERED that the petition for rule making of Manna Broadcasting Company, Inc., now Joe B. Wilmoth, seeking the allotment of Channel 284A to Monterey, Tennessee (RM-7331), IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Mountaintop's comments relate to its proposal to substitute Channel 273C for Channel 273A for Station WEGE-FM at Crossville, Tennessee. Inasmuch as we have modified Station WEGE-FM's authorization to specified the higher powered channel, Mountaintop's comments are moot. *See* 6 FCC Rcd 6636 (1991).

[2] Mr. Wilmoth, d/b/a JWC Broadcasting, became the licensee of Station WKXD-FM, Monterey, Tennessee, pursuant to the Commission's grant of the assignment of First Media of Monterey, Inc.'s license on October 16, 1991, and consummated on January 7, 1992.

[3] *See Revision of Radio Rules and Policies*, (MM Docket No. 91-140), 7 FCC Rcd 2755 (1992), *recons. filed*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-118

In the Matter of

Amendment of Section 73.202(b), RM-7667
Table of Allotments,
FM Broadcast Stations.
(Wrightsville, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 18, 1992; Released: June 4, 1992

Comment Date: July 27, 1992
Reply Comment Date: August 11, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Wrightsville Communications Company, Inc. ("petitioner"), permittee of Station KYTN(FM), Channel 299A, Wrightsville, Arkansas, seeking the substitution of Channel 299C2 for Channel 299A and modification of its permit accordingly. Petitioner stated its intention to apply for Channel 299C2 if allotted to Wrightsville, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 299C2 for Channel 299A at Wrightsville since it could provide an expanded coverage area FM service to the community. Channel 299C2 can be allotted to Wrightsville at the petitioner's currently authorized site,[1] located 2.0 kilometers (1.3 miles) west of the community, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[2]

3. The petitioner's modification request at Wrightsville is consistent with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the Class A permit for Station KYTN(FM) without entertaining competing expressions of interest in the use of Channel 299C2 at Wrightsville, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Wrightsville, Arkansas	299A	299C2

5. IT IS ORDERED, That the Secretary shall send a copy of this *Notice* to the licensee of Station KAKI(FM), as follows: Bridges Broadcasting Service, 202 East Cross, Benton, AR 72015.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **July 27, 1992,** and reply comments on or before **August 11, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James K. Edmundson, Esq.
Mark Van Bergh, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900
Washington, D.C. 20005

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

[1] Coordinates at the site specified in the construction permit issued for Station KYTN(FM) are 34-36-24 and 92-14-17.

[2] We note that the Wrightsville proposal is short-spaced to the presently licensed operation of Station KAKI(FM), Channel 296A, Benton, Arkansas, at coordinates 34-30-30 and 92-32-42 and thus dependent upon Station KAKI(FM) moving to Channel 294C2 in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 87-73. *See* 3 FCC Rcd 4840 (1988), *recon. denied,* 7 FCC Rcd 2555 (1992). Since the Wrightsville allotment proposal is dependent upon the grant of a license to Station KAKI(FM) on Channel 294C2, the issuance of a license for Station KYTN(FM) on Channel 299C2 may be withheld until Station KAKI(FM) is authorized to operate on its new channel. The licensee of Station KAKI(FM) will be served with a copy of this *Order.*

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 92-15

In the Matter of

Amendment of Section 73.202(b), RM-7886
Table of Allotments,
FM Broadcast Stations.
(Poipu, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 19, 1992; Released: June 4, 1992

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Lu Ann Uchida Lane ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 1360 (1992), proposing the allotment of Channel 240A to Poipu, Hawaii, as that community's first local FM service. Petitioner filed comments restating her interest in Channel 240A, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 240A to Poipu, Hawaii, as that community's first local FM service. Channel 240A can be allotted to Poipu in compliance with the Commission's minimum distance separation requirements without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That effective **July 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Poipu, Hawaii	240A

4. The window period for filing applications will open on **July 21, 1992,** and close on **August 20, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

[1] The coordinates for Poipu are North Latitude 21-52-35 and West Longitude 159-27-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-11

In the Matter of

Amendment of Section 73.202(b),	RM-7881
Table of Allotments,	
FM Broadcast Stations.	
(Inglis, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 19, 1992; Released: June 4, 1992

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Lucille Ann Lacy ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 884 (1992), proposing the allotment of Channel 282A to Inglis, Florida, as that community's first local FM service. Petitioner and William D. Elliott filed supporting comments. Guy Gannett Publishing Co., licensee of WZTU(FM), Channel 281C, Cocoa Beach, Florida, filed comments stating that it has no objections to the allotment of Channel 282A to Inglis, as long as the allotment conforms to the spacing requirements. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 282A to Inglis, Florida, as that community's first local FM service. Channel 282A can be allotted to Inglis in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.8 kilometers (1.1 miles) northwest,[1] in order to avoid a short-spacing to Station WZTU(FM), Channel 281C, Cocoa Beach, Florida.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 20, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Inglis, Florida	282A

4. The window period for filing applications will open on **July 21, 1992,** and close on **August 20, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 282A are North Latitude 29-02-45 and West Longitude 82-40-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 4, 1992

PACIFIC BELL FILES CORRECTIONS TO ITS PROPOSED COST ALLOCATION MANUAL REVISION

PUBLIC COMMENT INVITED

On April 10, 1992, Pacific Bell Telephone Company (Pacific) filed corrections to its proposed cost allocation manual revision for the separation of regulated and nonregulated costs for the quarter ended March 31, 1992. Pacific states that these corrections are typographical errors and minor omissions which were inadvertently overlooked and do not affect the content of the filing.

Parties may file comments no later than **June 15, 1992.** Replies should be filed by **June 30, 1992.** Comments should reference AAD number 92-41. A copy of each pleading should be sent to Ed Dashkin FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Ed Dashkin at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-125

In the Matter of

Amendment of the Aviation Services Rules (Part 87) to authorize use of the frequency 406.025 MHz for Emergency Locator Transmitters (ELTs). RM-7611

NOTICE OF PROPOSED RULE MAKING

Adopted: May 22, 1992; Released: June 5, 1992

Comment Date: July 27, 1992
Reply Comment Date: August 11, 1992

By the Commission:

I. INTRODUCTION

1. The National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA) filed a petition (RM-7611), public notice given February 7, 1991, Public Notice No. 1836, requesting that the Commission amend Part 87 of the Rules, 47 C.F.R. Part 87, to authorize the use of the frequency 406.025 MHz for emergency locator transmitters (ELTs) on aircraft.[1] The Federal Aviation Administration (FAA) and the United States Coast Guard (Coast Guard) filed comments supporting the use of 406.025 MHz for ELTs.

II. BACKGROUND

2. ELTs are small battery powered transmitters carried on aircraft that are used to transmit a distress signal. Presently, ELTs authorized in the United States operate on the frequencies 121.500 MHz and 243.000 MHz (hereafter 121.5 ELT).[2] The distress signal is used to alert others of a distress situation and to assist search and rescue (SAR) operations. When activated, 121.5 ELTs can be detected by overflying aircraft or nearby land stations if they are monitoring the distress frequency, or by low orbiting satellites that are part of an international satellite system, COSPAS/SARSAT.[3] A problem with the 121.5 ELTs, however, is that for satellite detection their location can only be computed if a satellite can relay, in real time, the distress signal to a ground station.[4]

3. In the 1983 Mobile World Administrative Radio Conference for the Mobile Services (MOB-83), the frequency 406.025 MHz was allocated for the exclusive use of low-power, earth-to-space emergency position indicating radiobeacons. On August 24, 1988, the Commission adopted rules authorizing the use of this frequency for EPIRBs in the Maritime Radio Service.[5] As an integral part of that rule amendment we adopted technical standards for such EPIRBs.[6]

III. DISCUSSION

4. NOAA's petition asks the Commission to authorize the use of the frequency 406.025 MHz for ELTs. In support of its petition NOAA states that the COSPAS/SARSAT system, primarily using the frequencies 121.5 MHz and 243.0 MHz, has progressed to a fully operational international system. NOAA notes the system has 18 nations participating and is responsible for having saved 1,607 people as of October 30, 1990. It indicates that potentially greater benefits would be derived from the implementation of the 406.025 MHz ELT.

5. The FAA strongly supports authorizing the use of 406.025 MHz for ELTs.[7] The FAA states that it is the agency responsible for requiring the carriage of ELTs and that it intends to allow 406 MHz ELTs to be voluntarily carried in addition to 121.5 ELTs.[8] In support of 406 MHz ELTs the FAA has developed technical standards[9] that will provide a means for manufacturers to get FAA and FCC equipment approval.

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[1] Emergency position indicating radiobeacon stations are used to send a distress signal that is used as an alerting signal and to assist search and rescue personnel. In the United States such beacons are named emergency locator transmitters (ELTs) when carried on an aircraft and emergency position indicating radiobeacons (EPIRBs) when carried on ships. ELTs and EPIRBs operate on the same frequencies and transmit identical distress signals.

[2] These frequencies are allocated internationally for use by emergency beacons such as EPIRBs and ELTs. *See* Radio Regulations, No. 3259, (International Telecommunications Union, 1990). The aviation industry typically refers to these ELTs as 121.5 ELTs.

[3] COSPAS is an acronym for a Russian phrase meaning space system for search and distress vessels. SARSAT stands for search and rescue satellite-aided tracking.

[4] The current satellite system does not have any storage capability for the 121.5 and 243.0 MHz distress signal and, thus, can only act as a "bent-pipe" to relay the distress signal to a ground station for processing. Because there are "blind spots" in the current satellite system (i.e., not every location on earth can be seen continuously from a satellite), emergency beacon signals may not get relayed to SAR personnel. As discussed below, the satellite system used for 406 MHz beacons can store distress signals and relay them to a ground station.

[5] *See* Report and Order, PR Docket No. 86-424, 3 FCC Rcd 5406 (1988).

[6] The technical standards are incorporated by reference in Section 80.1061 of the Commission's Rules, 47 C.F.R. § 80.1061, and are contained in the Radio Technical Commission for Maritime Services (RTCM) document titled "RTCM Recommended Standards for 406 MHz Satellite Emergency Position-Indicating Radiobeacons (EPIRBs)", dated July 31, 1987.

[7] FAA comments at 1.

[8] *See* 55 Fed. Reg. 12316 (April 2, 1990).

[9] These technical standards reference the Radio Technical Commission for Aeronautics (RTCA) document "Minimum Operational Performance Standards 406 MHz Emergency Locator Transmitters (ELTs), Document No. RTCA/DO-204", approved by RTCA on September 29, 1989.

6. The Coast Guard also supports authorizing the use of 406.025 MHz for ELTs.[10] The Coast Guard states it has considerable interest in this rule making because of its involvement in a substantial number of SAR operations involving aircraft needing assistance in maritime areas and its experience with 406 MHz EPIRBs. According to the Coast Guard, between 1985 and 1989, it participated in 1071 SAR operations in which aircraft needed assistance, resulting in 656 lives saved.[11] Further, the Coast Guard believes, based on its experience with the 406 MHz EPIRBs, that the carriage of 406 MHz ELTs will result in fewer ELT false alarms.[12] The Coast Guard notes that the transmitted distress signal contains an identification code that can be used to identify the owner of the beacon and the type of vessel in distress to facilitate SAR operations. The Coast Guard states that this information is maintained in a NOAA database which allows SAR forces to contact the licensee and determine whether the transmission is real or false, resulting in more efficient SAR operations and more lives saved.

7. NOAA is responsible for operating the Mission Control Center that receives emergency signals from the COSPAS/SARSAT satellite system. When NOAA detects a distress alert, it computes the position and forwards the information to the appropriate SAR forces who judge what SAR resources are needed. NOAA states that the 406 MHz distress alerting system offers several potential advantages over the current 121.5 MHz ELTs. Because the 406 MHz signal is digital, it is able to be stored and retransmitted once the satellite is over a ground station. This gives the system world-wide coverage with no blind spots. Additionally, the current 121.5 ELTs are experiencing problems with false alarms. These ELTs may transmit false alarms due to aircraft hard landings, mishandling, or problems related to beacon design, installation, or maintenance. NOAA also believes the 406 MHz system will virtually eliminate the problem of false alarms by providing SAR forces with an emergency contact number accessible through its database. This would permit SAR personnel to contact the aircraft owner in the event of an inadvertent activation of an ELT and avoid dispatching valuable SAR resources.[13]

8. An amendment of the rules providing for the use of the frequency 406.025 MHz could improve aircraft safety by providing for enhanced distress alerting functions. Our experience to date with EPIRBs that operate on this frequency has been favorable.[14] Further, the use of 406.025 MHz will become more widespread once the Global Maritime Distress and Safety System[15] (GMDSS) is implemented. Finally, use of 406.025 MHz for ELTs is supported by both the FAA and the Coast Guard. Accordingly, we propose to amend Part 87 of the Rules, as reflected in the Appendix hereto, to authorize the use of 406.025 MHz for ELTs. No application for modification of existing license would be required. Further, we propose that ELTs be required to comply with the technical standards in the Radio Technical Commission for Aeronautics (RTCA) document "Minimum Operational Performance Standards 406 MHz Emergency Locator Transmitters (ELTs), Document No. RTCA/DO-204". In addition to these proposals, we seek specific comments to the following issues:

- Currently the 406 MHz EPIRBs are required to have a low power 121.500 MHz transmitter for "homing". Should 406 MHz ELTs be required to have an integral 121.500 MHz "homing" beacon?
- Are there international requirements not covered in RTCA's technical standards?
- Should ELTs capable of operating on 406.025 MHz be certified as meeting COSPAS/SARSAT standards by an independent laboratory as is required for the 406.025 MHz EPIRBs or is the Commission's type acceptance process sufficient?

9. Currently, NOAA administers and maintains a database that contains a unique identification code for each 406 MHz EPIRB. Registration in this database is presently voluntary. Manufacturers must program into each EPIRB this unique code and provide an equipment plate or label on each 406 MHz EPIRB displaying the unique NOAA identification code and registration instructions.[16] Manufacturers must also include a pre-addressed post card soliciting the owner's name and address, telephone number, the type of ship and the unique identification code for registration with NOAA's database. In regard to this issue of registration with NOAA, we propose to treat 406 ELTs in the same manner that we treat 406 EPIRBs. We propose to require manufacturers to program each 406 MHz ELT with a unique code and to provide on each 406 MHz ELT a plate or label containing the registration instructions requested by NOAA. Additionally, we propose to require manufacturers to include with each marketed 406 MHz ELT a pre-addressed post card soliciting the name, address, telephone number, identification code and aircraft type of the owner for registration in NOAA's database. We seek specific comment as to the expected effectiveness of voluntary registration. For example, should the registration be made mandatory and if so what enforcement might be contemplated if beacons are not registered?

IV. PROCEDURAL MATTERS

10. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 27, 1992,** and reply comments on or before **August 11, 1992.** To file formally in this proceed-

[10] U.S. Coast Guard comments at 1.
[11] U.S. Coast Guard comments at 1.
[12] U.S. Coast Guard comments at 2.
[13] NOAA Petition at 2.
[14] The frequency 406.025 MHz has been authorized for shipboard use since October 3, 1988. *See* 53 Fed. Reg. 31004 (August 17, 1988).
[15] The GMDSS will replace the existing international manual Morse code ship-to-ship radiotelegraph system with a fully automated ship-to-shore distress alerting system using advanced satellite and terrestrial data communications systems.
[16] NOAA assigns a block of serial numbers to a manufacturer to be assigned to EPIRBs as they are manufactured.

ing, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Docket's Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The change proposed herein will have a beneficial effect on the aviation community by permitting the use of 406.025 MHz for ELTs by aircraft. These changes are voluntary and will not cause significant economic impact on any entity. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibitity Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1980).

13. For further information, call James Shaffer, Private Radio Bureau, Special Services Division, (202) 632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. In Section 87.133(a) the stability table is amended by adding a new entry at the end of paragraph (6) to read as follows:

§ 87.133 Frequency stability.

(a) * * *

Frequency band (lower limit exclusive, upper limit inclusive), and categories of stations.	Tolerance[1]	Tolerance[2]
* * * * *		
(6) Band-137 to 470 MHz:		
* * *		
Emergency locator transmitters on 406 MHz . .	N/A	5
* * * * *		

3. In Section 87.137(a) the emission table is amended by adding a new entry in alphabetical order to read as follows:

§ 87.137 Types of emission.

(a) * * *

Class of emission	Emission designator	Authorized bandwidth (kilohertz)		
		Below 50 MHz	Above 50 MHz	Frequency deviation
* * * * *				
G1D	16K0G1D		20 kHz	
* * * * *				

4. In Section 87.147 paragraph (b) is amended by revising the first sentence and adding a new paragraph (e) to read as follows:

§ 87.147 Type acceptance of equipment.

* * * * *

(b) ELTs that operate on the frequencies 121.500 MHz and 243.000 MHz that are manufactured after October 1, 1988, must meet the power output characteristics contained in paragraph 87.141(i) of this section when tested in accordance with the Signal Enhancement Test contained in Subpart N, Part 2 of this Chapter. * * *

* * * * *

(e) Application for type acceptance for ELTs capable of operating on the frequency 406.025 MHz must include sufficient documentation to show that the ELT meets the requirements of § 87.199(a).

5. In Section 87.173 the frequency table in paragraph (b) is amended by adding a new entry in numeric order to read as follows:

§ 87.173 Frequencies.

* * * * *

(b) * * *

Frequency or frequency band	Subpart	Class of station	Remarks
* * * * *			
406.025 MHz	F, G, H, I, J, K, M, O	MA, FAU, FAE, FAT, FAS, FAC, FAM, FAP	Emergency and distress
* * * * *			

6. In section 87.187 existing paragraphs (m) through (z) are redesignated (n) through (AA) and a new paragraph (m) is added to read as follows:

§ 87.187 Frequencies.

* * * * *

(m) The frequency 406.025 MHz is an emergency and distress frequency available for use by emergency locator transmitters. Use of this frequency must be limited to transmissions of distress and safety communications.

* * * * *

7. In Section 87.195 paragraph (a) is amended by adding a new sentence to read as follows:

§ 87.195 Frequencies.

(a) * * * ELTs that transmit on the frequency 406.025 MHz use G1D emission.
* * * * *

8. A new Section 87.199 is added to read as follows:

§ 87.199 Special requirements for 406.025 MHz ELTs.

(a) 406.025 MHz ELTs must meet all the technical and performance standards contained in the Radio Technical Commission for Aeronautics document titled "Minimum Operational Performance Standards 406 MHz Emergency Locator Transmitters (ELT)" Document No. RTCA/DO-204 dated September 29, 1989. This RTCA document is incorporated by reference in accordance with 5 U.S.C. 552(a). The document is available for inspection at Commission headquarters in Washington, D.C. or may be obtained from the Department of Transportation, Federal Aviation Administration, Office of Airworthiness, 800 Independence Avenue SW, Washington, D.C. 20591.

(b) An identification code, issued by the National Oceanic and Atmospheric Administration (NOAA), the United States Program Manager for the 406.025 MHz COSPAS/SARSAT satellite system, must be programmed in each ELT unit to establish a unique identification for each ELT station. With each marketable ELT unit the manufacturer or grantee must include a postage pre-paid registration card addressed to: NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233. The registration card must include the ELT identification code and must request the owner's name, address, telephone number and type of aircraft.

(c) In addition to the identification plate or label requirements contained in §§ 2.925, 2.926 and 2.1003 of the Commission Rules, each 406.025 MHz ELT must be provided on the outside with a clearly discernable permanent plate or label containing the following statement: "It is extremely important that the owner of this 406.025 MHz ELT register the NOAA identification code contained on this label with the National Oceanic and Atmospheric Administration (NOAA) whose address is: NOAA, NOAA/SARSAT Operations Division, E/SP3, Federal Building 4, Washington, D.C. 20233."

(d) For 406.025 MHz ELTs whose identification code can be changed after manufacture, the identification code shown on the plate or label must be easily replaceable using commonly available tools.

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition for Reconsideration of

Southern California
Broadcasting Company
Licensee, Radio
Station KIEV(AM)
Glendale, California

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1992; Released: June 4, 1992

By the Commission: Commissioner Quello concurring and issuing a separate statement.

1. The Commission has under consideration a "Petition for Reconsideration" filed by Southern California Broadcasting Company (SCBC), licensee of radio station KIEV(AM), Glendale, California. SCBC seeks reconsideration of the Commission's decision in *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991), issuing a $10,000 forfeiture for sponsorship identification violations. Based on various factors, SCBC requests mitigation of the forfeiture to $1,562.50. For the reasons discussed herein, we deny reconsideration.

2. In 1986, the Mass Media Bureau received a complaint that KIEV had broadcast promotional programs without announcing that consideration had been paid for the airing of the programs. In response to a Bureau letter of inquiry, KIEV acknowledged that "Investors Club of the Air," a 90-minute program aired Monday through Friday, had been paid for by Investors Club of the Air but that a sponsorship announcement to this effect had not been broadcast. KIEV stated that the program would be identified as such in the future. KIEV also stated that Richard Epstein had purchased the time for "Travel Talk," a daily 30-minute program. Bureau staff review of an audiotape of a July 30, 1986, broadcast of that program revealed that no announcement identifying Mr. Epstein as the sponsor had been provided. The Bureau issued a $10,000 Notice of Apparent Liability, finding KIEV in apparent violation of § 317(a)(1) of the Communications Act and § 73.1212(a) of the Commission's Rules. KIEV requested mitigation of the forfeiture, based on the station's attempts to comply with the law, and its contention that the forfeiture was an unnecessarily "severe penalty" for the particular infractions involved. The Bureau rejected KIEV's arguments and issued the $10,000 Forfeiture Order. *Liability of Southern California Broadcasting Company*, (MMB), released September 27, 1990. The Commission upheld the forfeiture in *Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991). SCBC now requests further reconsideration of the forfeiture amount but no longer challenges its legal underpinnings.

3. SCBC points out that the Commission issued its *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, just days after it issued SCBC's forfeiture, announcing standards that would have benefited SCBC had it been issued previously. SCBC submits that the policy statement reflects a more flexible approach to assessing forfeiture amounts, and analyzes the "upward and downward adjustment criteria," (*id.* at 4700), to recompute what it believes is a fair forfeiture amount for its acknowledged violation. Under the upward adjustment criteria, SCBC argues that its violation was not egregious, did not cause substantial harm to either the public or a fellow broadcaster, nor did SCBC realize substantial economic gain from it. SCBC acknowledges that its violation was continuous but suggests only a 20% upward adjustment, in that not all programs in that series were necessarily as deficient as the ones targeted by the Commission, and no other programming was involved.

4. Under the downward adjustment criteria, SCBC contends that its complete and frank cooperation during the Commission's investigation constitutes "good faith and voluntary disclosure," and that, in any event, the basis for the original complaint, payola, was not proven. SCBC also claims that it originally informed the Bureau that the station's corrective measures preceded the first Bureau inquiry. SCBC suggests a 15% downward adjustment under this "good faith" factor. SCBC also suggests a 50% downward adjustment under "history of overall compliance" on the basis of SCBC's good record of compliance with the statute and the terms of its licenses as a long-time Commission licensee. (At the time its pleading was filed, SCBC was also the licensee of KNRY(AM), Monterey Bay, California.) Finally, SCBC pleads "inability to pay" and recommends a 25% downward adjustment, due to its past and continuing financial losses at both KIEV and KNRY. As support, SCBC submits a confidential statement of income for fiscal 1990 purporting to show the company's significant net loss as compared with its 1989 net profit. SCBC also submits confidential documentation reflecting significant net losses at KIEV for the first seven months of 1991, and for KNRY in 1990. SCBC points out that it is seeking a buyer for KNRY, which has been operating under Special Temporary Authority for fewer hours than the minimum operating schedule under Section 73.1740 of the Commission's Rules, and that it has significantly reduced its staff as well.[1] SCBC concludes that a $10,000 forfeiture is a severe financial burden at this juncture, and requests a reduction in conformity with its calculations.

5. As an initial matter, we note that the analytical framework for deriving forfeiture amounts set forth in *Standards for Assessing Forfeitures* is not directly applicable to this case. As that policy statement makes clear, it was prompted by congressional legislation, effective December 19, 1989, increasing the amount of forfeitures the Commission has authority to assess. Since the conduct in question here occurred prior to 1989, and is, therefore, not subject to these higher forfeiture amounts, we conclude that the approach set forth in *Standards* is not necessarily appropriately used in this case.[2] In any event, the factors

[1] During the pendency of this proceeding, SCBC sold KNRY to KNRY Radio.

[2] We note, however, that if we were able to apply the increased forfeiture amounts (up to $25,000 in this case) made possible by

which SCBC believes we should now consider are either unavailing or were already taken into account, pursuant to our statutory mandate, in assessing a forfeiture of $10,000.

6. Specifically, with respect to SCBC's contention that we should take into account its broadcast record, we are required to take into account the licensee's record pursuant to the statutory forfeiture provisions, and we did so in this case. SCBC has also failed to make a proper showing to support its financial hardship argument. Its documentation, consisting of a statement of income for both KIEV and KNRY, does not include any information concerning payments to principals, even though the Attachment to the Notice of Apparent Liability requires submission of such information from licensees seeking mitigation of forfeitures due to inability to pay. In any event, the information submitted in financial reports for SCBC indicates that the company's net (as well as gross) revenues are sufficiently large to call into question its claim that the forfeiture assessed would work a substantial hardship. Therefore, SCBC has not presented an adequate basis for reconsideration.

7. With respect to its "good faith" argument, the Bureau pointed out in its September 27, 1990, forfeiture order that SCBC's frank response to our letter of inquiry provided no basis for relief from imposition of the forfeiture, as we expected nothing less than complete candor under Section 73.1015 of our Rules.[3] *Liability of Southern California Broadcasting Company* (MMB), released September 27, 1990, at 2. By the same token, SCBC's frankness after the fact provides no basis for mitigation. If that were so, every licensee responding truthfully to a Commission inquiry would be entitled to a forfeiture mitigation. Compliance with Section 73.1015 is an obligation. *See, e.g., Dover Radio Page, Inc.*, 4 FCC Rcd 4107 (CCB 1989)(cooperation with Commission in investigation does not itself mitigate a violation). Although we acknowledge that SCBC did claim to take corrective measures before the first Bureau inquiry, this mitigating fact[4] was taken into consideration in determining the original forfeiture amount. Thus, taking into account the continuing nature of the violation, as well as the other matters raised by SCBC, we conclude that $10,000 is an appropriate forfeiture.

8. Accordingly, IT IS ORDERED that, pursuant to Section 1.106(j) of the Commission's Rules, the Petition for Reconsideration of Southern California Broadcasting Company is denied.

9. IT IS FURTHER ORDERED that Southern California Broadcasting Company, licensee of station KIEV(AM), Glendale, California, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of ten thousand dollars ($10,000) for willful and repeated violations of Section 317(a)(1) of the Communications Act and Section 73.1212(a) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

SOUTHERN CALIFORNIA BROADCASTING COMPANY LICENSEE, RADIO STATION KIEV(AM) GLENDALE, CALIFORNIA

I concur with the Commission's decision to deny the petition for reconsideration in this case. I write separately, however, to express my concern about the way the Commission administers its policy regarding forfeitures. This case highlights the difficulty faced by any licensee that seeks mitigation of a Commission-imposed forfeiture. Although the $10,000 fine in this case was not assessed under the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd. 4695 (1991), *recon. pending*, it carries implications for the flexibility that we claim to possess in assessing penalties pursuant to that policy. Consequently, I believe that this case shows why the Commission should reconsider the policy statement on forfeitures.

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the 1989 legislation, we would, taking into account the relevant factors in the *Policy Statement* and all relevant circumstances in this case, assess a forfeiture of no smaller amount than that assessed here.

[3] Section 73.1015 requires truthful written statements and responses to Commission inquiries and correspondence.

[4] *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 721 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company
Revisions to Tariff
F.C.C. Nos. 68 and 73

Transmittal No. 2182

ORDER

Adopted: May 15, 1992; **Released: May 19, 1992**

By the Chief, Common Carrier Bureau:

1. Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2182 to introduce Signalling System Seven (SS7) Signalling as a new nonchargeable common switching feature available with Feature Group D (FGD) and Basic Serving Arrangement-D (BSA-D). SWB proposes to establish a nonrecurring charge (NRC) to convert FGD and BSA-D trunks to SS7 signalling. A NRC to install the Calling Party Number (CPN) Parameter, the Carrier Selection Parameter, and the Customer Signalling Point Code are also proposed in the filing. *See* Southwestern Bell, Transmittal No. 2182 Description and Justification at 1-1-1-10. The tariff is scheduled to take effect on May 20, 1992.

2. MCI Telecommunications Corporation (MCI) and Sprint Communications Company L.P. (Sprint) filed petitions to reject, or to suspend and investigate, Transmittal 2182 on April 6, 1992. SWB filed a reply to the petitions filed by MCI and Sprint on April 16, 1992.

3. MCI and Sprint argue that SWB is proposing to introduce substantial NRCs for the implementation of SS7 and insist that these charges ignore the efficiencies which will be obtained by the conversion of SWB's customers from multifrequency (MF) signalling to SS7 signalling. MCI Petition at 2-3; Sprint Petition at 2-3. Petitioners assert that the assessment of NRCs on SS7 trunk conversions is counterproductive in that it may provide an economic disincentive for some customers to convert to the SS7 technology, thereby diminishing the potential benefits which could be realized by SWB and its other customers from this signalling technology. MCI Petition at 3; Sprint Petition at 3. Finally, petitioners question the necessity of these charges since other local exchange carriers have filed tariffs which do not assess NRCs for MF-to-SS7 conversions. MCI Petition at 3; Sprint Petition at 3.

4. Petitioners also allege that SWB is proposing to change its jurisdictional reporting requirements for terminating access minutes without describing or justifying the modifications. MCI Petition at 3-4; Sprint Petition at 3-5. Thus, argue the petitioners, SWB's filing is in violation of Section 61.54 of the Commission's Rules and should be rejected. MCI Petition at 4; Sprint Petition at 4-5.

5. SWB replies that the objections raised by MCI and Sprint are unwarranted. SWB Reply at 1. First, SWB insists that its proposed NRCs are reasonable in that SWB only seeks to recover its one-time cost for conversion to SS7 from the costcauser. *Id.* at 2. SWB argues that since not all of its customers have indicated an intention to purchase SS7 interconnection, those customers who elect not to purchase SS7 will incur no charge. SWB asserts that application of NRCs will ensure that the cost of conversion is paid only by the converting customer. *Id.* SWB argues that this method of assessment is fully consistent with Commission precedent and policy. *Id.* at 2-3.

6. In response to charges that it is improperly modifying jurisdictional reporting requirements, SWB asserts that its modification is appropriate. SWB explains that contrary to the contentions of Sprint and MCI, SWB's use of the CPN Parameter to determine Percent Interstate Usage (PIU) is appropriate. *Id.* at 4. SWB notes that prior to the introduction of SS7 the only method available for allocating terminating usage between interstate and intrastate jurisdictions was the data used by SWB to develop the projected interstate percentage for originating access minutes or a customer-provided PIU. *Id.* SWB argues that originating usage is not always indicative of terminating usage and that a customer-provided PIU, while not exact, is more accurate. *Id.*

7. However, SWB argues that with the introduction of SS7, the CPN becomes available as an additional parameter in the signalling message. SWB asserts that when the CPN is passed on a call terminating to SWB, the jurisdiction of the call can be determined from the actual call detail of the usage record (*i.e.*, originating number and terminating number are present on the record), and there is thus no reason to apply any other PIU factor. *Id.* at 4-5. SWB contends that "[s]ince the highest level of accuracy is the actual jurisdiction of the call detail, it is certainly appropriate for MCI and Sprint to provide this detail to SWB." *Id.* at 5. Finally, SWB asserts that although MCI and Sprint want SWB to apply a customer-estimated PIU to all terminating usage, it is more accurate to use the PIU from actual usage, when available, on terminating traffic. *Id.* at 5-6. Therefore, SWB argues that the proposed modification is appropriate and should be allowed. *Id.* at 6.

8. The Common Carrier Bureau has reviewed Southwestern Bell Transmittal No. 2182 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Southwestern Bell Telephone Company Tariff F.C.C. Nos. 68 and 73, Transmittal No. 2182, filed by MCI Telecommunications Corporation (MCI) and Sprint Communications Company L.P. (Sprint), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-313
Phase II

In the Matter of

Policies and Rules Concerning
Operator Service Providers

ORDER

Adopted: May 18, 1992; Released: May 19, 1992

By the Chief, Common Carrier Bureau:

1. In the *OSP Reporting Requirements Order*, we directed all interstate providers of operator services to submit periodic reports concerning their rates, complaints about their service, and their costs of providing service.[1] That Order established reporting requirements that are generally consistent with the reporting requirements proposed by the Commission in a *Further Notice of Proposed Rulemaking* in this docket.[2] The fourth and final such report is currently due September 21, 1992. By this Order we modify the schedule for submission of this final report by the OSPs and the period to be covered by this report.

2. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), which is codified as Section 226 of the Communications Act, 47 U.S.C. § 226, directs the Commission to initiate a proceeding to determine whether the regulatory objectives specified in Section 226(d)(1) of the Act are being achieved. Those objectives are to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate long distance calls and to ensure that consumers have the opportunity to make informed choices in making such calls. TOCSIA directs the Commission to submit three reports to Congress on the achievement of these objectives. In order to gather data for these reports, the Commission proposed requiring OSPs to submit the four reports referred to above. The Bureau, acting pursuant to authority expressly granted in the *FNPRM*, finalized the requirements proposed in the *FNPRM* with minor modifications.[3]

3. We concluded in the *OSP Reporting Requirements Order* that OSPs should file reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. We found that this schedule would allow the Commission sufficient time to prepare its reports to Congress. The *OSP Reporting Requirements Order* directed OSPs to file information for the period February 1, 1992 through July 31, 1992 in their final reports on September 21, 1992.

4. We now believe, however, that a modified schedule for submission of the OSPs' final report will better enable the Commission to prepare a full and accurate report to Congress on the issues committed to the Commission's jurisdiction. We therefore direct OSPs to submit their fourth reports on August 21, 1992. This report shall cover separately the first two calendar quarters of 1992, *i.e.*, January 1, 1992 through March 31, 1992, and April 1, 1992 through June 30, 1992. This will allow the Commission to assess the effects of regulatory and other changes in the operator services market in its final report to Congress. In addition, this modification will provide the Commission additional time to assess the data. Finally, we direct OSPs to submit data for the period July 1, 1992 through July 31, 1992 not later than September 21, 1992, the original due date for their final submissions.

5. We believe that the additional burden imposed on OSPs by modifying our reporting requirements in this manner will be quite small. OSPs already are obligated to gather all of the data that are to be included in their final report. Admittedly, OSPs must report these data separately for two three-month periods and for the month of July, but we conclude that this additional burden is not unreasonable. Moreover, although the OSPs' fourth report will now be due approximately one month earlier than under our original schedule this should not impose any additional burden on the OSPs. The OSPs will have the same amount of time from the close of the monitoring period to the due date of the final report as they would have had under our original schedule. Finally, the supplemental report that is due September 21, 1992 is merely a reduced version of the filing that OSPs were already obligated to make under the terms of the *OSP Reporting Requirements Order*. The burden of this filing is thus less than it would have been absent these minor procedural modifications.

6. The Office of Management and Budget (OMB) has approved the collection of information proposed in the *FNPRM*, adopted in the *OSP Reporting Requirements Order*. OMB has issued Control Number 3060-0468 for this information collection. Authority to conduct this information collection expires December 21, 1993. Pursuant to the terms of this Order, operator service providers must file information regarding their rates, consumer complaints, and various costs. This information will be used to monitor the operator services industry and to assist the Commission in preparing reports to Congress as required by the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990). The reported information will be available for public inspection, except as otherwise indicated in this and prior Orders of the Commission and Common Carrier Bureau. Responses by operator service providers are mandatory.

7. Public reporting burdens for the collection of information initiated by this Order are as follows:

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[1] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com.Car.Bur. 1991) (*OSP Reporting Requirements Order*).

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Further Notice of Proposed Rulemaking, 6 FCC Rcd 120 (1990) (*FNPRM*).

[3] The Commission delegated to the Chief, Common Carrier Bureau "authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding." *FNPRM*, 6 FCC Rcd at 124.

Reports	Average Hours per Response
Report on Rates:	4 hours
Report on complaints:	2 hours
Report on cost data:	4 hours

These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Comments regarding the burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, may be sent to the Federal Communications Commission, Office of Managing Director, Paperwork Reduction Project, (3060-0468), Washington, DC 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Paperwork Reduction Project, (3060-0468), Washington, DC 20503.

8. Accordingly, IT IS ORDERED that all providers of interstate operator services SHALL FILE the information required by this Order on the schedule indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: May 19, 1992; Released: May 21, 1992

By the Chief, Common Carrier Bureau:

1. In an Order adopted November 5, 1991, the Commission found that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Corporation (Vitelco) between January 2, 1990 and June 30, 1990 were unlawful to the extent those rates exceeded rates in effect prior to January 2, 1990. The Commission therefore ordered Vitelco to issue refunds with interest within 60 days of the release of the *December 16 Order*.[1] The Commission also directed Vitelco to file a report describing Vitelco's efforts to effectuate these refunds within 30 days of the release of that Order.

2. On January 3, 1992, Vitelco filed a motion to stay the reporting and the refund requirements imposed by the Commission in the *December 16 Order*. Vitelco sought the stay pending reconsideration of the refund by the Commission or judicial review. The Common Carrier Bureau has previously extended the deadline for the refund and the reporting requirements[2] in order to provide further time to consider Vitelco's stay request and other related pleadings.[3] That deadline now expires May 22, 1992. In this Order, and for the same reasons, we again extend the deadline. In so doing, we are relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i).

3. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), that the deadline for the Virgin Islands Telephone Corporation to file a refund report with the Commission and to effectuate the refunds ordered by the Commission in the above-captioned docket, IS EXTENDED until **June 19, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Memorandum Opinion and Order, 6 FCC Rcd 7350 (1991) (*December 16 Order*).

[2] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 2609 (Com.Car.Bur. 1992); *see also* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 2166 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 1444 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 711 (Com.Car.Bur. 1992).

[3] On January 10, AT&T filed an opposition to Vitelco's motion for stay. On January 16, Vitelco filed a motion to accept its late-filed reconsideration petition. AT&T filed its opposition to Vitelco's motion on January 23; Vitelco filed its reply on January 31, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West
Communications, Inc. Transmittal Nos. 242, 263
Revisions to Tariff
F.C.C. No. 1

ORDER

Adopted: May 21, 1992; Released: May 22, 1992

By the Chief, Common Carrier Bureau:

1. On March 27, 1992, US West filed Transmittal 242 to offer flexible automatic number identification (Flex ANI). Flex ANI is a software package that allows telephone companies to extend existing ANI service, by providing additional values for the ANI information indicator digits forwarded to access customers. These indicator digits enable access customers to identify the originating location of calls, *e.g.,* hotels, prisons, and hospitals, and thereby apply specific pricing structures to these calls. Currently, the only available values for the information indicator digits are hard coded in the basic "generic" switch program, so that changes or additions to the values require a major switch program upgrade. Flex ANI enables the more convenient, software-based activation of new values for information indicator digits (specific to individual carrier identification codes) within each end office where Flex ANI is available. Customers who subscribe to ANI but do not order Flex ANI will still receive the information indicator digits populated by the standard values hard coded in the switch.[1]

2. US West plans to offer Flex ANI as an option available with Feature Group D or as an option to the ANI basic service element (BSE) that is offered with the FGD-equivalent basic serving arrangement (BSA). US West intends to impose a nonrecurring charge of $1,120.00 for Flex ANI, or $1,170.00 for Flex ANI "without associated trunk activity."[2] Transmittal 242 is scheduled to take effect on May 26, 1992, on 60 days' notice. Two parties filed petitions to reject or suspend and investigate Transmittal 242, and US West filed a reply.[3] For the reasons discussed below, we deny these petitions.

3. US West intends to charge for Flex ANI as a "new service" under the Commission's price cap rules. MCI argues that Flex ANI is a "general network upgrade" rather than a new service, and that US West should not be allowed to establish a separate charge for this service.[4] MCI contends that the "underlying premise" of price cap regulation is to encourage carriers to become more efficient without increasing prices, and alleges that a separate Flex ANI charge is inconsistent with this "underlying premise."[5] MCI and Sprint maintain that Flex ANI should be considered an equal access cost.[6] Finally, Sprint and MCI note that other carriers offer Flex ANI as a non-chargeable option, and asserts that US West should be required to do likewise.[7] US West responds that Flex ANI is properly classified as a new service under the Commission's price cap rules.[8]

4. MCI disputes US West's contention that there will be no cross-elastic effects resulting from US West's Flex ANI offering, and maintains that failure to provide projections of crosselastic effects violates Section 61.49(h)(1)(ii) of the Rules.[9] US West responds that Flex ANI has no cross-elastic effects because it is not a substitute for ANI or any other service.[10] Sprint contends that US West has not provided adequate support for its demand estimates or its software development costs.[11] US West retorts that its demand estimates and software development cost support complies with the Commission's price cap rules.[12]

5. Sprint also argues that a nonrecurring charge for Flex ANI would recover most of the costs of the service from the customers who subscribe to the service first. Sprint recommends a recurring charge for Flex ANI, and suggests bundling the costs of Flex ANI with US West's ANI BSE.[13] US West answers that a nonrecurring charge is appropriate for Flex ANI, because the costs associated with Flex ANI are nonrecurring.[14]

6. The Common Carrier Bureau has reviewed US West Transmittal Nos. 242 and 263, MCI's and Sprint's petitions, and US West's reply. We conclude that no compelling argument has been presented that these tariff transmittals are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate US West Communications, Inc., Transmittal No. 242, filed by MCI Telecommunications Corp. and US Sprint Communications Company Limited Partnership ARE DENIED.

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[1] US West, Transmittal No. 242, Description and Justification (D&J) at 1-1 through 1-2. US West originally planned to offer Flex ANI as an option to Feature Group D access service or the ANI BSE. In Transmittal No. 263, US West revised its Flex ANI offering as a BSE available only in conjunction with ANI. This tariff structure is similar to Ameritech's structure for Flex ANI.

[2] *Id.* at Workpaper 1. The additional charge for Flex ANI without "associated trunk activity" recovers labor costs associated with order negotiation and processing performed by the Interexchange Carrier Service Center (ICSC). *Id.* at 2-2.

[3] The parties filing petitions are MCI Telecommunications Corporation (MCI), and US Sprint Communications Company Limited Partnership (Sprint).

[4] MCI Petition at 1-2.

[5] *Id.* at 2-3.

[6] *Id.;* Sprint Petition, Attachment at 4-6.

[7] Sprint Petition, Attachment at 5; MCI Petition at 3-4.

[8] US West Reply at 3.

[9] MCI Petition at 3, *citing* Section 61.49(h)(1)(ii) of the Commission's Rules, 47 C.F.R. § 61.49(h)(1)(ii).

[10] US West Reply at 3-4.

[11] Sprint Petition at 3.

[12] US West Reply at 4-5.

[13] *Id.* at 3-4.

[14] US West Reply at 5-6.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 22, 1992

COMMISSION REQUESTS ADDITIONAL COMMENTS IN PHASE II OF WESTERN UNION REMAND PROCEEDING

ACTION IN CC DOCKET NOS. 78-97
PHASE II AND 82-122

Pleading Cycle Established

COMMENTS DUE: June 19, 1992
REPLY COMMENTS DUE: August 3, 1992

CC Docket No. 78-97 was first initiated by the Commission to investigate Western Union's international telex and TWX public rates. It was later expanded to include Western Union's rates to the Interconnected Carrier Parties (ICPs).[1] From January 1978 to April 1981, Western Union used a distance-sensitive rate schedule. When Western Union converted to postalized rates on April 24, 1981, the Commission opened Phase II of the investigation. In its investigation of Western Union's postalized rates, the Commission found that certain ICPs should have paid Western Union the same amounts that Western Union's public customers paid for the domestic portion of international telex service, and that insufficient non-cost considerations existed to permit Western Union to charge different rates to the ICPs and to the public for the same service. The Commission therefore required the ICPs to reimburse Western Union amounts equal to the 15 percent discount from Western Union's public rates that the ICPs actually received. This Order was appealed by the ICPs to the United States Court of Appeals for the District of Columbia.

This case was remanded by the D.C. Circuit at the Commission's request to permit further review of its findings in Phase II of the investigation. The Commission requested the remand in order to further consider the Phase II proceeding in light of the findings of the D.C. Circuit concerning the Commission's decisions in Phase I of the proceeding.[2]

We now request comments on the following issues: (1) whether the public rates that the Commission allowed to become effective for Western Union's telex and TWX facilities were appropriately applied to the ICPs during the June 1982 to August 1984 period when interim prescription rates were in effect; (2) whether non-cost considerations justified lower rates for the ICPs than for the general public for the same services; (3) whether the Commission has authority to order reimbursements from the ICPs to Western Union for the June 1982 to August 1984 period; and (4) whether interest should be assessed on any amounts the ICPs may owe Western Union. Commenters may also supply additional information that they believe will aid the Commission's resolution of these issues. Commenters must explain how such information was derived and include a detailed explanation of the methodology used, including any accounting or statistical methods employed. Parties shall attach full copies of any relevant earlier pleadings from this proceeding to their comments, and shall cite to those pleadings wherever appropriate.

An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and six copies to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. For further information contact Debra Sabourin, Common Carrier Bureau, Tariff Division at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

[1] The ICPs were ITT World Communications, Inc., TRT Telecommunications Corporation, Western Union International, Inc., RCA Global Communications, Inc., FTC Communications, Inc., Graphnet Inc., International Relay, Inc., and Consortium Communications International.

[2] TRT Telecommunications Corp. v. FCC, 857 F.2d 1535 (D.C. Cir. 1988)(We solicited additional comments on Phase I in Public Notice, CC Docket No. 78-97, 7 FCC Rcd 2366 (Com.Car.Bur. 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal Nos. 13 and 21
F.C.C. No. 6	

ORDER

Adopted: May 22, 1992; Released: May 22, 1992

By the Chief, Common Carrier Bureau:

1. On April 8, 1992, AT&T Communications (AT&T) filed Contract Tariff Transmittal No. 13 which is scheduled to become effective May 23, 1992.[1] This transmittal was originally scheduled to become effective on April 22, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[2] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 6 to provide AT&T MEGACOM service under a revised rate structure, for a term of five years.

2. On April 15, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Contract Tariff Transmittal No. 13 and Sprint Communications Company (Sprint) filed a petition to reject or alternatively suspend and investigate Contract Tariff Transmittal No. 13.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff Transmittal No. 13 and the petitions. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 6, Transmittal No. 13, filed by MCI Telecommunications Corporation, and the petition to reject or alternatively suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 6, Transmittal No. 13, filed by Sprint Communications Company, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Pursuant to Special Permission No. 92-361, AT&T filed Contract Tariff Transmittal No. 21 to modify Contract Tariff Transmittal 13 on May 22, 1992.

[2] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.* Memorandum Opinion and Order, FCC 92-181, released Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4093
Tariff F.C.C. No. 2

ORDER

Adopted: May 27, 1992; Released: May 28, 1992

By the Chief, Common Carrier Bureau:

1. On May 14, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 29, 1992 on 15 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces a new promotional offering for AT&T MEGACOM 800 Service.

2. On May 21, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 4093.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4093 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4093, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.* Memorandum Opinion and Order, FCC 92-181, released Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. No. 15

Transmittal No. 1854

Competitive Pricing Plan No. 2 Resort Condominiums International

ORDER

Adopted: May 27, 1992; Released: May 28, 1992

By the Chief, Common Carrier Bureau:

1. On May 22, 1992 American Telephone and Telegraph Company (AT&T) filed a motion seeking an extension, from May 28 to June 5, of the deadline for filing its rebuttal in this tariff investigation proceeding.[1] AT&T states that an extension is necessary to allow AT&T to fully analyze and respond to the issues raised in the oppositions filed on May 21. AT&T also states that an extension is needed in light of its counsel's other obligations and the intervening holiday weekend. According to AT&T, counsel for MCI and CompTel (two of the three parties opposing AT&T's direct case) have stated that they do not oppose the extension, while counsel for US Sprint (the other party opposing AT&T's direct case) took no position.

2. Although it is the policy of the Commission that extensions of time shall not be routinely granted,[2] we believe, in light of the importance of the issues presented in this proceeding, that the public interest would be served by allowing AT&T the additional time it requests for filing its rebuttal. Therefore, we grant AT&T's motion and extend the date for filing the rebuttal until **June 5, 1992.**

3. Accordingly, IT IS ORDERED, pursuant to sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the motion of AT&T for extension of time is GRANTED. The deadline for filing the rebuttal is extended to **June 5, 1992.**

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[1] AT&T Communications, Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Supplemental Designation Order and Stay*, CC Docket No. 90-11, FCC 92-180, released April 16, 1992.

[2] *See* 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-206

In re Applications of

SACRED HEART UNIVERSITY, INC.
Channel 202B1
Shirley, New York
File No. BPED-891215MD

For Construction Permit
for a New Educational
FM Station

LONG ISLAND UNIVERSITY
Channel 202B1
Southampton, New York
File No. BPED-900522MI

For Modification of the
Facilities of Station WPBX(FM)

Appearances

Nathaniel F. Emmons and *Mark N. Lipps* on behalf of Sacred Heart University, Inc.; *William E. Kennard*, *Michael E. Beller*, and *Eric T. Werner*, on behalf of Long Island University; and *Robert A. Zauner*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 27, 1992; Released: June 4, 1992

PRELIMINARY STATEMENT

1. This case involves two remaining mutually exclusive applications for construction permit for a noncommercial educational FM station to operate on Channel 202B1 on Long Island, New York. Following publication of the Hearing Designation Order (*HDO*) on July 29, 1991, notices of appearance were filed by Sacred Heart and Long Island University (LIU). A third applicant, Long Island Educational TV Council, Inc., moved to dismiss its application, and the Presiding Judge accordingly dismissed that application with prejudice. *Order*, FCC 91M-2593, released August 20, 1991.

2. As to Sacred Heart and LIU, the two applicants that remain in the proceeding, the HDO designated the following issues:

> 1. To determine with respect to Sacred Heart . . . whether the applicant[] [is] financially qualified.
>
> 2. If a final environmental impact statement is issued with respect to Sacred Heart . . . or LIU in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301-1319.
>
> 3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The Chief, Audio Services Division has advised that the environmental statements submitted by Sacred Hearts and LIU satisfy the requirements of 47 C.F.R. Section 1.311. The contingent environmental issues have, therefore, been deleted. Also, the financial qualifications issue designated against Sacred Heart (Issue 1) has been resolved by summary decision in favor of Sacred Heart. *Order*, FCC 91M-3045, released October 8, 1991 (ALJ).

4. In light of the foregoing, the only issues remaining to be resolved in the Initial Decision following the evidentiary hearing are Issues 3, 4, and 5.

5. A prehearing conference was held on September 27, 1991, and the hearing was held in Washington, D.C., on December 16, 1991. The record was closed on that date at the conclusion of the hearing. (Tr. 195; *see also*, *Order*, FCC 91M-3467, released December 18, 1991). Proposed findings of fact and conclusions of law were filed on January 27, 1992, and replies were filed on February 10, 1992.

Findings of Fact

Section 307 (b) Issue

6. Sacred Heart proposes to construct and operate a new station licensed to the community of Shirley, New York. Shirley has a 1990 Census population of 22,936 (Sacred Heart Ex. 1, Tab I, p. 2) and currently has no locally licensed AM or FM transmission service (*id.*, Tab J).

7. LIU proposes to modify the facilities of its existing noncommercial educational FM Station WPBX, Southampton, New York.[1] The proposed modification involves

only a change of frequency and an increase of effective radiated power. It does not involve any change of transmitter location or community of license. (Sacred Heart Ex. 2, pp. 1, 5; Tr. 156). The sole effect of the proposed modification would be to expand the coverage of WPBX to the east and west. (Tr. 159).

8. The following is a comparison of the population and land area within each applicant's predicted 1 mV/m contour:

Applicant	Area (sq. km)	Population
Sacred Heart	1,397	369,740
LIU	1,052	105,175

9. The following is a comparison of the population and land areas that would receive new 1 mV/m or greater service from grant of each of the proposals.

Applicant	Area (sq. km)	Population
Sacred Heart	1,397.0	369,740
LIU (Expanded service area)	627.5	69,460

10. Each of the applicants would provide service to underserved areas and populations.[2] The following is a comparison of the first through fifth noncommercial service each of the applicants would provide.

Sacred Heart

Service to be Provided	Area (sq. km)	Population
1st	646.9	117,223
2nd	445.9	44,864
3rd	115.2	48,185
4th	107.6	80,864
5th	32.4	31,694

LIU

1st	627.5	69,460
2nd	0	0[3]
3rd	0	0
4th	0	0
5th	0	0

Contingent Comparative Issues

Sacred Heart University

11. Sacred Heart is a private nonprofit non-sectarian educational institution located in Fairfield, Connecticut, which was founded in 1963 to provide an educational opportunity to the people of Southwestern Connecticut. The University is incorporated under the laws of the State of Connecticut and is governed by a 25-member Board of Trustees. The day-to-day operation of the University is directed by the president, who is currently Anthony J. Cernera. (Sacred Heart Ex. 1, ¶ 3.).

12. The academic objectives of the University are primarily pursued through associate and baccalaureate degree programs offered through the seven Faculties of Communications Studies, Education and Psychology, Financial Studies, Humanistic Studies, Management and Computer Science, Political and Social Sciences, and Science and Mathematics. In addition, Master's degree programs in Business, Education, Nursing Administration, and Religious Studies provide opportunities for further specialized study. The University serves the region from its main campus in Fairfield, Connecticut, and several off-campus sites, including one for its Masters in Nursing program located in Northport, Long Island, New York. (Sacred Heart Ex. 1, ¶ 5.).

13. The University has twenty undergraduate departments offering twenty-four major areas of study for the baccalaureate degree. One of these, the Department of Media Studies, offers a program that combines the study of communications theory and technology with the liberal arts. Students concentrating in Media Studies examine the theories behind contemporary communication in journalism, film, and broadcasting. (Sacred Heart Ex. 1, ¶ 6.).

14. Sacred Heart meets its educational mission through its commitments to instruction, research, and public service. One of the University's principal public service activities is its noncommercial educational broadcast operation. The University has owned and operated WSHU(FM), Fairfield, Connecticut, since 1964. Initially, the station served only the greater Bridgeport/Southwestern Connecticut area. However, a power increase from 1.0 to 12.5 kilowatts granted by the Commission in 1988 enabled WSHU to extend its service area to include parts of Westchester County, New York, and the North Shore of Long Island. (Sacred Heart Ex. 1, ¶ 7.).

15. With this service area expansion, WSHU established two Long Island studios, one at Port Jefferson and one at Selden (on the campus of Suffolk County Community College). In addition, the station maintains a news desk at the press room in the State Supreme Court Building in Mineola, New York, which it staffs 20 hours a week. Currently, 26% of the station's member listeners are Long Island residents. (Sacred Heart Ex. 1, ¶ 8.).

16. Sacred Heart now seeks to broaden its Long Island service to fill what it believes is a significant void in public broadcast programming on Long Island. The most serious deficiency, in Sacred Heart's view, is the unavailability of National Public Radio (NPR) programming in Suffolk County from any station except Sacred Heart's WSHU. No local station on Long Island provides NPR service, and the NPR affiliate in New York City (WNYC) is too far away to provide a listenable signal. WSHU is an NPR affiliate and does broadcast NPR programming to the North Shore of Long Island. However, WSHU's coverage of Long Island is limited and does not reach most of Suffolk County. The proposed station at Shirley would allow Sacred Heart to bring NPR programming to most of Suffolk County. (Sacred Heart Ex. 1, ¶ 9.).

17. Sacred Heart's decision to seek expanded service to Long Island was also promoted by a 1989 report to Congress by the National Telecommunications Information Agency (NTIA) entitled "Public Broadcast Coverage in the United States," which noted that even after Sacred Heart expanded its service to Long Island, about 18 percent of New York State's unserved population (in terms of public radio coverage) was on Long Island. (Sacred Heart Ex. 1, ¶ 10 and Tab B.). In addition, there is a substantial public demand by Long Island residents for improved and expanded WSHU broadcast service. This is reflected by approximately 300 letters in the record from members of the public expressing interest and support for such expansion, a majority of which letters are from people within the proposed service area of the Shirley station. (Sacred Heart Ex. 1, ¶ 11 and Tab C; Tr. 39.).

Proposed Programming

18. The proposed Shirley station will broadcast in stereo 24 hours a day, 7 days a week. It will be a member of National Public Radio, American Public Radio, and the Associated Press. It will also be a licensee of Metro Weather West for local Long Island weather reports and a subscriber of Shadow Traffic NY for local Long Island traffic reports. (Sacred Heart Ex. 1, ¶ 12.).

19. As a member of NPR, the station will broadcast the NPR news magazine programs "Morning Edition," "All Things Considered," and "Weekend Edition." These national programs will be complemented with a local Long Island host who will insert local segments of Long Island news, weather reports, traffic reports, and in-depth local issue-oriented news and public affairs reports. In addition, the station will regularly produce public affairs and news magazines which will highlight the services provided by Long Island organizations and the arts community. A one-hour weekly program, "Long Island Radio Pages," will address exclusively local Long Island issues. The station will also work with local libraries and cultural and arts organizations in the production of arts magazines for broadcast and the development of community calendars. Altogether, the station will broadcast more than 30 hours per week of news and information programs and more than 5 hours per week of community affairs programs. In addition, the station will from time to time broadcast musical performances by local artists. (Sacred Heart Ex. 1, ¶ 13 and Tab E.).

20. The balance of the station's programming will be primarily classical music. More than 100 hours per week of classical music and music appreciation programs will be broadcast. In addition to the affiliations listed above, the station will be an affiliate of the Beethoven Satellite Network, which provides classical music, complementing that provided by NPR and music programs that Sacred Heart will produce itself. (Sacred Heart Ex. 1, ¶ 14 and Tab E.). Only 15 hours out of 168 hours each week will be simulcast with WSHU. (Tr. 130).

Community Ascertainment

21. Sacred Heart will maintain ongoing ascertainment of the needs and interests of Shirley and the other communities to be served by the proposed station, as well as of the programming interests of its listeners. Several methods of ascertainment will be used. First, Sacred Heart has a Long Island community advisory board known as Long Island Friends of WSHU. This group, which is separately incorporated, is composed of local community leaders and members of the general public who regularly provide suggestions for coverage of local issues and events. It will be expanded to encompass the service area of the Shirley station and will act in the same advisory capacity for that station. (Sacred Heart Ex. 1, ¶ 15; Tr. 82-86.).

22. The station will also keep fully informed of local issues and developments by closely monitoring the large number of press releases, statements, promotional materials, and public service announcements received daily (via mail or fax) from a great many local public officials, candidates, civic, business, political, charitable, and cultural organizations. Other local news sources, such as local and regional newspapers, will be thoroughly reviewed each day for information on significant issues and events. (Sacred Heart Ex. 1, ¶ 16 and Tab F.).

23. In addition, as a means of determining listeners' programming preferences, the station will conduct focus group interviews with listeners four times a year and will conduct annual membership surveys by sending written programming questionnaires to all member listeners. (Sacred Heart Ex. 1, ¶ 17.).

Control and Staffing of Station

24. Day-to-day operational control of the Shirley station will be exercised by George Lombardi, the Director of Radio Operations for the University, who will also be the General Manager of the proposed station. Mr. Lombardi will report directly to the University's Vice President for Institutional Advancement, who in turn will report directly to the President of the University. The President is accountable to the Board of Trustees. (Sacred Heart Ex. 1, ¶ 18.).

25. Mr. Lombardi's position will be full-time, a minimum of 40 hours per week. (He typically spends 50-60 hours a week directing Sacred Heart's broadcast operations.) He anticipates that he will devote approximately 40 percent of his time to administrative duties relating in common to both WSHU and the Shirley station, and approximately 25 percent of his time to the Shirley station alone. (Sacred Heart Ex. 1, ¶ 19.).

26. Mr. Lombardi has directed Sacred Heart's broadcast operations and has been the full-time General Manager of WSHU since 1983. In that capacity he has been in charge of all aspects of operation, including programming, personnel, budget and financing, technical operations, and community relations. His staff currently numbers 10 full-time paid employees, 11 part-time paid employees, and 34 student interns. He has been involved in broadcasting since he was a volunteer, as a student, at WSHU in 1969. Prior to becoming General Manager of WSHU in 1983, he was WSHU's part-time Chief Engineer and Chief Operator from 1974 to 1983. In addition, he has been employed at the following other radio stations: WICC, Bridgeport, Connecticut, as a part-time engineer from 1969-1972; WJZZ, Bridgeport, Connecticut, as a part-time operator from 1970-1972; WVOF, Fairfield, Connecticut, as part-time Chief Operator from 1978-1982; and WEZN, Bridgeport, Connecticut, as part-time engineer from 1987-present. He currently holds a General Radio Telephone Operator's License issued by the Commission. He has continuously taught college level classes in "Radio Production," "Broadcast Electronics," and "Introduction to Media" at Sacred Heart University since 1982. (Sacred Heart Ex. 1, ¶ 20).

27. In addition to Mr. Lombardi as General Manager, the Shirley station will have 5 full-time employees including a Program Director, News Director, and Music Director, approximately 5 part-time employees, and approximately 10 student interns. (Sacred Heart Ex. 1, ¶ 21.).

Integration into University's Cultural and Educational Objectives

28. One of Sacred Heart University's defined missions is public service to the community, and the University considers its broadcast operation as one means of providing such service. (Sacred Heart Ex. 1, ¶ 22 and Tab H.). Mr. Lombardi testified that the proposed Shirley station will directly advance this public service objective (a) by bringing a new public radio service (including NPR program-

ming) to areas that are presently unserved or underserved by public broadcast stations, (b) by addressing in its broadcast programming the local needs and issues of the communities in its service area, (c) by providing a local broadcast outlet over which individuals, community leaders, and representatives of organizations in the service area can communicate their viewpoints to the public, and (d) by promoting worthy causes and activities in the community through public service announcements, news coverage, fundraising assistance, and other means. (Sacred Heart Ex. 1, ¶ 23.).

29. The Shirley station will also serve the University's educational objectives by providing students with practical training and experience in broadcasting and broadcast-related fields that are a part of the University's curriculum. Student interns from several departments of the University -- Media Studies, Music, Art, Marketing, and Management -- earn academic credits for work at WSHU, and will do so at the Shirley station as well. For example, Media Studies students will serve as announcers; Music student will develop music appreciation programs for broadcast, assist in providing material for the introduction of classical music performances; and Marketing students will design the membership survey questionnaires and conduct the listener focus group interviews. The Shirley station will provide students with additional opportunities to pursue these kinds of educational activities. (Sacred Heart Ex. 1, ¶ 24; Tr. 88-92.).

Auxiliary Power

30. The proposed Shirley station will maintain auxiliary power generators at both its transmitter and its main studio to assure uninterrupted broadcast service in the event of a power failure. (Sacred Heart Ex. 1, ¶ 25.).

Emergency Broadcast System

31. The proposed Shirley station will participate in the Emergency Broadcast System. (Sacred Heart Ex. 1, ¶ 26).

Long Island University

32. Long Island University, (LIU), was chartered in 1926 by the Regents of the University of the State of New York. LIU Ex. 1 at 1. A 45-member Board of Trustees oversees university operations. *Id.* at Tab A. LIU offers a multidisciplinary curriculum in areas including Art, the Sciences, Business and Public Administration, Education, Sociology, and Communications Arts. *Id.* at 1-2, Tab B. The university has three campuses on Long Island, at Brookville, Brentwood, and Southampton. *Id.* at 2. LIU also has a campus in Brooklyn, New York. The student body at the Southampton campus, which was founded in 1963, consists of 1,330 undergraduate students and 110 graduate students. (Tr. 189).

33. LIU identifies three objectives of its radio service. The first is to "link its campuses" with a radio network on Long Island. (*Id.* ¶¶ 6, 7.) The second is to provide a variety of quality programming to a general audience. (*Id.*, ¶ 8.) The third is to provide students and community volunteers hands-on-experience in professional broadcasting. (*Id.*)

Current WPBX Operation

34. LIU has been operating WPBX, Southampton, since 1982. (Tr. 155) and now seeks to enlarge the coverage area of that station. WPBX presently broadcasts 19 hours a day with a mixture of classical, jazz, and progressive music; world, national, and local news; business news; local marine and traffic reports; and weather. (*Id.*, ¶ 9 and Att. D.) Only 18 hours of the station's program week are not locally produced. (Tr. 174) Listeners are periodically surveyed to ascertain programming desires and tastes. (*Id.*, ¶¶ 10, 14 and Att. E.)

35. All LIU students who qualify academically currently have the opportunity to participate, and do participate, in the operation of WPBX. (Tr. 160-164; LIU Ex. 1, ¶¶ 11, 12.) Likewise, the station accepts the volunteer services of community volunteers who wish to participate. (Tr. 162)

36. The student and community volunteer staff of WPBX work under the supervision of a full-time general manager, Clayton T. Jones, who has held that position since 1987. (LIU Ex. 1, ¶ 13 and Att. G, p. 8.) He reports to the Provost of the Southampton campus, who in turn reports to the President of LIU. A community governing board also provides input into programming and operational policies. (*Id.*, ¶ 13 and Att. G, p. 1)

Proposed WPBX Operation

37. LIU states that it will increase WPBX's current 19-hour broadcast day to 24 hours. (*Id.*, ¶ 17.) However, the station is already authorized to broadcast 24 hours a day and has chosen heretofore to operate on a reduced schedule. (Tr. 176-177.) LIU has elected not to broadcast 24 hours a day because of its belief that its current audience is not large enough to warrant the additional hours of operation. (Tr. 177) LIU hopes that the increased coverage resulting from LIU's upgrade would lead to a larger audience warranting a 24 hour service. (Tr. 177-178)

38. LIU also claims that WPBX will carry NPR Network programming. (LIU Ex. 1, ¶ 9) This too, however, is a service that WPBX has so far chosen - - primarily because of financial priorities -- not to provide. (Tr. 174-175)

39. In terms of LIU's asserted cultural and educational objectives, the proposed WPBX upgrade will have little or no effect. As Provost Bishop conceded, a grant of LIU's application would not "link" any LIU campuses because no other LIU campus is within the proposed WPBX expanded coverage area. (Tr. 166.) Nor would a grant of this application enhance WPBX's ability to carry programming produced at other campuses, since WPBX already has that capability. (Tr. 167-168)

40. Similarly, a grant of LIU's upgrade application will not create any new or additional opportunities for students or community volunteers. The existing WPBX operation already accommodates all qualified students and community volunteers who wish to participate. (Tr. 160-164) LIU can and will continue to provide those opportunities whether or not its WPBX upgrade application is granted. (Tr. 165)

Auxiliary Power

41. LIU proposes to install auxiliary power generators to power its studio and transmitter in the event of a power failure. (LIU Ex. 1, ¶ 17.) WPBX does not now have, and has never had, auxiliary power capacity. (Tr. 178.) LIU has

budgeted for auxiliary power in its upgrade application. LIU has no present plan to install auxiliary power if its upgrade application is not granted. (Tr. 179-180)

Share Time Issue

42. Sacred Heart does not believe that a time-sharing arrangement with LIU would be the most effective use of the channel or would better serve the public interest. Sacred Heart believes that public confusion would inevitably result from such an arrangement, to the detriment of both students. Furthermore, a time-sharing arrangement would severely limit the amount of NPR programming that Sacred Heart would provide. Moreover, since Sacred Heart proposes white area and gray area service to substantially more people than does the LIU proposals, Sacred Heart believes that a time-sharing arrangement would deny access and diversity of noncommercial programming to a great many residents of the community who would be better served if Sacred Heart's application were granted. (Sacred Heart Ex. 1, ¶ 27.)

43. LIU likewise believes that a time-sharing arrangement with Sacred Heart would not be feasible and would not serve the public interest because, in LIU's view, it would diminish LIU's ability to meet the needs of WPBX's current listeners and serve new listeners in its expanded service area. (LIU Ex. 1, ¶ 18.)

CONCLUSIONS

Section 307 (b) Issue

44. The issue calls for a determination, pursuant to Section 307(b) of the Communications Act of 1934, as amended, whether Sacred Heart's proposed new educational FM station in Shirley, New York or LIU's proposed modification of its existing facilities in Southampton, New York would best provide a fair, efficient and equitable distribution of radio service. Sacred Heart's proposal merits a dispositive preference under the Section 307(b) issue.

45. Sacred Heart prevails under the criteria recognized for resolving a Section 307(b) issue. Those criteria are set forth in the Commission's 1982 policy statement, *Revision of FM Assignment Policies and Procedures, (Second Report and Order)* 90 FCC 2d 88, 91 (1982), which established the Section 307(b) priorities as follows:

(1) first full-time aural service;

(2) second full-time aural service;

(3) first local service;

(4) other public interest matters.

In adopting the above priorities, the Commission stated that the greatest emphasis needs to be given to assuring the availability of at least one full-time radio service to as many people as possible. The next two priorities were equal in importance. 90 FCC 2d at 92.

46. While the 1982 policy statement did not specifically address noncommercial educational FM service, the Commission has since held that the same priorities apply in noncommercial cases. "[W]e see no reason to depart from the established priorities for the noncommercial educational FM service. Thus, we believe the appropriate criteria to be used are the priorities set forth in *Revision of FM Assignment Policies and Procedures*." *FM Channel Assignments (Noncommercial Channels)*, 53 RR 2d 1354, 1355 (MMB 1983)

47. Consistent with this concept, the Commission has come to treat noncommercial service and commercial service alike in implementing the mandate of Section 307(b). In *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2788 (1990), the Commission noted that "[t]he regulations governing noncommercial radio have changed markedly" since the early 1970's and that "now all noncommercial educational stations have an obligation to serve the significant programming needs of their communities." In view of this local service obligation, said the Commission, noncommercial educational stations are now to be included in the analysis of local transmission service under Section 307(b). *Id. See also, Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990) (to same effect); *Channel 32 Broadcasting Company*, 6 FCC Rcd 5188 (1991) (noncommercial stations now to be included in analysis of comparative coverage).

48. In the instant case, Sacred Heart will provide a first noncommercial educational service to a population of 117,233 and a second such service to a population of 44,864. By contrast, LIU will provide a first such service to a population of 69,460 and no second such service. In addition, Sacred Heart will provide its proposed community of license, Shirley, New York, with its first local transmission service. LIU's community of license, Southampton already has one aural service, LIU's WPBX. Further, Sacred Heart's proposal also serves the public interest since Sacred Heart proposes to initiate a new service while LIU proposes merely to expand an existing service. A new first local service is presumptively preferred over the provision of expanded service for an existing station. *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050-1051 (D.C. Cir. 1977).

49. In sum, Sacred Heart's proposal is superior under each of the criteria set forth in the Commission's *Second Report and Order*. It is, therefore, concluded that Sacred Heart merits a dispositive Section 307(b) preference. Moreover, since resolution of the 307(b) issue in favor of Sacred Heart is dispositive of this case, there is no need to reach the contingent comparative issue.[4] [5]

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of Sacred Heart Universities, Inc. for a construction permit for a new educational FM station in Sacred, New York IS GRANTED; and the application of Long Island University for modification of the facilities of Station WPBX(FM) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The record does not include the population of Southampton.

[2] In determining the applicants' service to underserved areas and populations only noncommercial educational stations were considered.

[3] Table V of the Joint Engineering Exhibit indicates that LIU would provide a second aural service to 424.5 sq. km. with a population of 35,815. A review of the engineering map included with the joint engineering exhibit, however, makes clear that the first service to the area is its own current 1 m/Vm signal. Thus, in fact, LIU would not be providing any second service.

[4] Given the importance the Commission attaches to "white area" and "gray area" coverage as well as providing a first local transmission service, as proposed by Sacred Heart, an enforced share-time arrangement in this case would not serve the public interest.

[5] *Assuming, arguendo*, the contingent comparative issue is reached, Sacred Heart's proposal warrants a preference over that of LIU. Sacred Heart has demonstrated its proposed new station would advance the university's cultural and educational objectives far better than would LIU's proposed power increase. Sacred Heart is proposing a new service to the public that will provide additional educational opportunities for students. By contrast, LIU's proposal to increase the power of an existing station provides only a limited expansion of program service with no additional educational opportunities. Also, Sacred Heart must be favored for its vastly superior comparative coverage. In addition, there is a demonstrated public demand for Sacred Heart's service. The record reflects no comparable widespread public demand for LIU's proposed service.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications
Equipment and Services by the
Hearing Impaired and Other
Disabled Persons

REPORT AND ORDER

Adopted: May 14, 1992; Released: June 4, 1992

By the Commission:

I. INTRODUCTION

1. In *Memorandum Opinion and Order and Further Notice of Proposed Rule Making* (*MO&O*) in CC Docket No. 87-124, 5 FCC Rcd 3434 (1990), *recon. denied*, 6 FCC Rcd 4799 (1991) (*Order*), the Commission determined that telephones in common areas of the workplace would have to be hearing aid compatible[1] by May 1, 1991.[2] The Commission also proposed rules requiring that telephones in all areas of the workplace, all telephones in hotel and motel rooms, and all telephones in rooms in hospitals, residential health care facilities for senior citizens, convalescent homes and prisons be hearing aid compatible by May 1, 1992. The proposed rules would result in these telephones being subject to retrofitting,[3] which would, in a large number of cases, require the discovery and replacement or refurbishment of non-hearing aid compatible telephones, not at refurbishers' shops or in the inventories of distributors and manufacturers, but in the field at those locations where they have already been installed and are in use. The present *Report and Order* adopts the proposed rules but, to avoid excessive costs associated with field retrofitting, delays the effective date of the rules until May 1, 1993 for establishments with twenty or more employees, and until May 1, 1994 for all others. Comments in opposition to the proposed rules have been filed by the North American Telecommunications Association (NATA), the Utilities Telecommunication Council (UTC), the Southern New England Telephone Company (SNET), and the GTE Service Corporation (GTE). Comments in support of the proposed rules were received from the American Speech-Language-Hearing Association (ASLH) and Self Help for Hard of Hearing People (SHHH), Inc. A joint comment in support of the proposed rules was received from the Maryland Office of People's Counsel, the National Center for Law and the Deaf, the New York League for the Hard of Hearing, the Hearing and Speech Agency of Metropolitan Baltimore, Inc., the Maryland Governor's Office for Handicapped Individuals, the Telecommunication Exchange for the Deaf, Inc., Telecommunications for the Deaf, Inc., Minnesota Telecommunications Access for Communicatively Impaired Persons, the California Center for Law and the Deaf, the Arizona Council for the Hearing Impaired and the Alexander Graham Bell Association for the Deaf, Inc. (collectively AG Bell). Comments also were received from the United States Telephone Association (USTA). Reply comments were filed by AG Bell, joined by the National Association for the Deaf, and by NATA.

II. CONTENTIONS

2. In its comments, NATA asserts that the Commission lacks the authority to require retrofitting of telephones that are not actually "provided for emergency use," according to 47 U.S.C. Section 610(f).[4] Reclassifying all workplace, hotel, motel and hospital telephones as "provided for emergency use," NATA claims, distorts the language of the statute and runs counter to illustrative examples given in committee hearings held pursuant to passage of the act containing that language.

3. SNET and NATA argue that the Commission underestimated the cost of retrofitting. NATA, noting the statutory requirement that the Commission specifically consider the costs and benefits to all telephone users of any regulations it proposes to implement, presents a study purporting to show that the average costs of retrofitting a telephone would be far greater (as much as $45.14) than

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[1] Hearing Aid Compatibility is defined in 47 CFR Section 68.4(a)(3):

> A telephone is hearing aid compatible if it provides internal means for effective use with hearing aids that are designed to be compatible with telephones which meet established technical standards for hearing aid compatibility.

[2] This decision was based, in part, upon an estimated retrofitting cost of $1.50 per telephone as stated in Senate Report No. 100-391, 100th Cong. 2d Sess. at p. 5 (1988) and the limited number of instruments that would be affected by the rule change. On reconsideration, the Commission decided that even if the $1.50 estimate was unrealistically low, the benefits of the change still outweighed the costs because of the limited number of instruments affected. *Order* at 4800.

[3] Section 68.4(a)(2) of the Commission's Rules states that, with limited exceptions, every telephone installed on or after January 1, 1985, must be hearing aid compatible.

[4] 47 U.S.C. Section 610(f) prohibits the Commission from requiring retrofitting of telephones other than coin operated telephones and "telephones provided for emergency use." In the *MO&O*, the Commission stated that it could not, as a practical matter, determine which telephones "will or will not be in a 'place where a hearing impaired person might be isolated in the event of an emergency,'" quoting the House Report's clarification of the meaning of "telephones provided for emergency use." H.R. Rept. No. 100-674, 100th Cong. 2d Sess. (1988). Therefore, pursuant to 47 U.S.C. Section 610(a), which requires the Commission to establish regulations to insure reasonable access to telephone service by persons with impaired hearing, the Commission concluded that it had the power to extend the definition of "telephones provided for emergency use" to all telephones in the workplace and the other areas listed in the proposed rules.

the $1.50 estimate relied upon in the *MO&O* and asserts that the $1.50 figure was itself based on a misunderstanding of statements made in the Senate Report.[5] The study concludes that 12 million business telephones would be affected by the proposed rules. NATA also refers to the greater intangible costs in harm to the goodwill of telephone distributors and manufacturers that might result if millions of the telephones they sold to their customers are required to be retrofitted.

4. UTC argues that the proposed rules are unnecessary given the present requirement that workplace common area telephones and any hearing impaired employee's primary telephone be hearing aid compatible.[6] Moreover, UTC and SNET both claim that the present requirement that all imported or newly manufactured telephones in the U.S. be hearing aid compatible will, through the process of replacement, soon make all telephones in the U.S. hearing aid compatible. [7]

5. UTC claims that the arguments favoring a Commission determination that all workplace telephones are "provided for emergency use" might as easily favor a determination that residential telephones are "provided for emergency use." It believes that, since the Commission has not considered reclassifying residential telephones, its determination that workplace telephones should be reclassified might be declared arbitrary and capricious by a court.

6. Finally, UTC suggests that, if the Commission does decide in favor of the proposed rule changes, it limit their application to workplaces with twenty or more employees and extend the effective date of the rules to May 1, 1994, to diminish the impact on businesses.

7. GTE, too, asserts that the Commission is misreading the Senate Report and confusing the incremental costs of manufacturing a hearing aid compatible telephone with the costs of retrofitting. According to GTE, the very determination of what equipment needs to be replaced or altered will add to the expense of retrofitting. In some cases, GTE believes an entire system, not simply the separable telephone sets, may need to be replaced. GTE argues that the burdens of the proposed regulation will often fall on crucial businesses or institutions such as hospitals, nursing homes and prisons that are short of funds. GTE claims that because the Commission has failed to provide a mechanism to inform affected parties of the rule changes, another cost will arise as a result of the need to inform end users of their legal obligations under the proposed rules.[8] GTE concludes that a better method for insuring hearing aid compatibility is to rely on the operation of present law and the replacement of telephones over time. This conclusion, in GTE's view, is bolstered by the fact that there are devices available to the hearing aid wearer "at nominal cost to adapt almost any telephone to HAC."

8. ASLH argues on behalf of the proposed rules that those who provide services to the hearing impaired, as well as the hearing impaired themselves, depend on the use of the telephone. Limited telecommunications services, according to ASLH, will impose costs in terms of lost employment opportunities and functional independence and pose a threat to personal safety. ASLH argues that the proposed rules, because they apply to all areas of the workplace, hotels, motels, etc., may be clearer and easier to enforce and, therefore, more cost effective than the current guidelines.[9]

9. SHHH supports the proposed rule changes because it believes that Congress' intent was to provide as much access as possible to the telephone system for persons who are hearing impaired. SHHH also argues that hearing aid wearers are often unable to use even a hearing aid compatible telephone because of a variety of other technical problems which it thinks the Commission should address.[10]

10. AG Bell argues that the proposed rules further Congressional intent because they enable hearing impaired people who need to make emergency calls to make them without having to search for a hearing aid compatible telephone, because they eliminate impediments to the job flexibility, hiring and upward mobility of hearing impaired employees, and because they provide telephone access to hearing impaired visitors to the workplace. AG Bell points out that an emergency can occur in any location and that the proposed rules will eliminate inconvenience and risk for travelers because current regulations do not guarantee that the hearing impaired who stay in hotels and motels will be placed in one of the rooms that is provided with a hearing aid compatible telephone under the 10% rule.[11] AG Bell also argues, relying on statements before a Senate Subcommittee, that the difference in the cost of compatible vis-a-vis non-compatible telephones is minimal and the costs to business brought about by the proposed rules will be insignificant.[12] AG Bell, in its reply, argues that a cost benefit analysis favors the proposed rules because none of the parties who submitted comments questioned the benefits of the rules and because it feels that the low $1.50 per telephone cost estimate for retrofitting is accurate.

11. AG Bell cites the disparity among GTE's $2.60 to $4.50 estimate for retrofitting, SNET's $25.00 estimate and NATA's $45.14 estimate as evidence of their untrustworthiness. AG Bell also contends that the NATA cost survey's estimate that 31% of all telephones would

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[5] Note 2, *supra*.

[6] 47 CFR Sections 68.112 (b) and (c).

[7] *See* 47 U.S.C. Section 610(b)(1)(B).

[8] USTA, a trade association of telephone companies, volunteers its assistance in disseminating information about the proposed rules if the Commission sees fit to adopt them.

[9] ASLH's statements opposing an increase in the required field strength of telephones deal with a matter not presently at issue. The *MO&O* at para. 24 decided the question. No evidence has been presented that would support a change in the current standards, nor has the Commission proposed to consider such evidence in the instant proceeding.

[10] SHHH's assertions about other means of improving telecommunications access for the hearing impaired apart from hearing aid compatibility are not within the scope of this proceeding; *but c.f. Report and Order and Request for Comments* in C.C. Docket No. 90-571, 6 FCC Rcd 4657 (1991) (relay services for the hearing impaired). The issue of closed circuit telephones has been decided. *MO&O* at para. 20. As regards the issue of weak field strength, see note 9 *supra*.

[11] 47 CFR Section 68.112(c)(3) provides that, until 10% of a hotel or motel's rooms are provided with hearing aid compatible telephones, any room telephones that are replaced must be replaced with hearing aid compatible telephones.

[12] AG Bell's arguments regarding hearing aid compatibility requirements for closed circuit telephones are outside the scope of the present case. *See* note 10, *supra*.

need retrofitting should not be credited because this is not in accord with Congress' finding that between 75% and 85% of all telephones in the United States are hearing aid compatible. Further, AG Bell challenges SNET's and GTE's estimates as being untrustworthy because they are unexplained. AG Bell contends that there is no costly problem identifying hearing aid compatible telephones because all new telephones manufactured or imported for use in the United States after August 16, 1989, must be hearing aid compatible by law and because the largest manufacturer of telephones before 1982 has produced only hearing aid compatible telephones since 1951.

12. Finally, AG Bell asserts that the remarks offered by NATA to show that Congress thought retrofitting was too costly are not applicable to the present case, since Congress had in mind the cost of retrofitting *all* telephones, not just those encompassed by the proposed rules. Moreover, AG Bell disputes UTC's contention that the failure to require that residential telephones also be hearing aid compatible might render the proposed rules arbitrary and capricious in the eyes of a court. AG Bell believes that Congress specifically denied the Commission authority to designate residential telephones as "essential" and contends that hearing aid users need greater access to telephones in the workplace than to telephones in private residences.

III. DISCUSSION

13. In establishing rules to implement the provisions of the Hearing Aid Compatibility Act of 1988 the Commission is required to "consider the costs and benefits to all telephone users, including persons with and without hearing impairments." 47 U.S.C. Section 610(e). In its *MO&O*, the Commission established a rule requiring all credit card telephones and all telephones in common areas of the workplace to be hearing aid compatible. The Commission, in considering the costs and benefits of that rule, reasoned that "the costs... should be small, because such telephones are likely to constitute only a small percentage of all telephones in the workplace...." *MO&O* at para. 15. In the *Order*, the Commission denied petitions for reconsideration of these rules, stating that the benefits outweighed the costs "given the small number of telephones involved." *Order* at para. 8 Moreover, having been confronted with the same variety of apparently contradictory and inconsistent assertions about the cost of retrofitting telephones and the same disagreement over the significance of the $1.50 cost estimate provided in S. Rep. No. 100-391 that have been presented here in this proceeding, the Commission concluded:

> [W]e find that even if the cost per unit of retrofitting may be, as alleged, substantially higher than the $1.50 figure mentioned in the *MO&O*, there is no evidence that the universe of telephones involved is large, or that costs to any particular entity are significant. [*Order* at para. 8]

In contrast to the rules adopted in the *MO&O*, which applied mainly to credit card and workplace common area telephones, the proposed rules extend to a much larger universe -- all workplace telephones, all telephones in all hotel and motel rooms, and all telephones in all rooms in hospitals, residential health care facilities for senior citizens, convalescent homes and prisons.

14. The affidavit of NATA's research director details the results of a survey of responses "received from 22 telephone manufacturers and distributors, representing over 60% of the installed base of multiline business telephones." NATA, Declaration of Eric Nelson, para. 3. The responses showed that 31% of these telephones were non-hearing aid compatible.[13] On the basis of these responses, Mr. Nelson estimates that 12 million non-hearing aid compatible business telephones will be affected by the proposed rules. This estimate supposes that 5 million of 17 million potentially affected telephones would already have been replaced by hearing aid compatible telephones between August 27, 1990, and May 1, 1992. Since the survey responses included the rate of depletion of company inventories, NATA, Declaration of Eric Nelson, para. 6, this 5 million figure would appear to be credible.

15. Additionally, Mr. Nelson's survey summary averages the reported costs of retrofitting of each of the responding NATA members at $45.14 per telephone with a mean of $43.75. NATA's explanation of the discrepancy between its average cost estimate and that of SNET ($25.00) is that the retrofitting of telephones in SNET's service area (a small, densely populated state) should, indeed, be less expensive. The density is reflected in SNET's estimate that it has 17,000 telephone sets located in 170 locations, that is, an average of 100 sets per location. SNET at 3. Furthermore, SNET's estimate does not include the cost of field testing to identify which telephones are non-hearing aid compatible. SNET at 4.

16. The far greater discrepancy between NATA's figures and the $2.60 to $4.50 per unit estimate of GTE is explained by GTE's assertion that it was estimating retrofitting costs for telephones "already at a rehab or refurbishing center." GTE at 4. Therefore, GTE's estimate does not include the cost of going into the field to those locations where there are non-hearing aid compatible telephones to be discovered and retrofitted. The difference between GTE's and NATA's estimates does not, as AG Bell argues, make them unreliable.

17. This evidence shows that the $1.50 figure cited in the Senate Report does not reliably represent the cost of retrofitting telephones in the field. Furthermore, it may not have been intended to represent those costs. In its Report, the Senate Committee stated:

[13] AG Bell claims that this figure is untrustworthy in light of the Senate Report's estimate that hearing aid compatible telephones represented "between 75% and 85% of all telephones in the United States." AG Bell at 7. But the discrepancy between the Senate's estimate and NATA's conclusion that 31% of business telephones were non-hearing aid compatible would be explained if business telephones, as opposed to residential and other telephones, were only slightly more often non-hearing aid compatible.

> ... retrofitting telephones currently in use... appears to be too costly at this time. **Aside from the obvious administrative and enforcement problems of recalling** all non-HAC telephones, the cost of retrofitting telephones to make them HAC appears to be about $1.50 per telephone, or more in the case of certain telephones.

S. Rep. No. 100-391 at 5 (emphasis added). The statement thus appears to indicate that the $1.50 estimate did not include any costs attributable to identifying and reaching or collecting the telephones that needed to be retrofitted. The Senate Report in which the figure is included determined, at least partly on the basis of that figure, that retrofitting would be too costly. This suggests that the figure was seen as being quite large, and this, in turn, lends credence to the view that it was understood to describe only one component of the real cost of a complete field retrofitting program.

IV. CONCLUSION

18. When we issued the *Further Notice of Proposed Rule Making* presently being considered, we tentatively concluded that we could not with assurance predict where a hearing impaired person might be isolated during an emergency and that the extension of the definition of "telephones provided for emergency use" to include all workplace telephones would, therefore, be both beneficial and in keeping with the intent of the Hearing Aid Compatibility Act of 1988. Section 610(a) of the Communications Act requires that we provide reasonable access to telephone service for the hearing impaired, and what is reasonable in terms of costs and benefits may change over time. The arguments of ASLH, SHHH and AG Bell regarding the potential benefits of the rules, including easier enforcement of a uniform requirement, are not rebutted.

19. However, in reviewing the arguments as to the costs and benefits of the proposed rules, we find that the costs of field retrofitting, which would be required by the proposed rule changes, are likely to be significantly higher than the $1.50 per set estimate originally relied upon, in part, by the Commission and that the universe of telephones affected by the proposed rules will be considerably larger than that affected by the rules upheld in the *Order*.

20. In light of the discussion above and considering especially the quantity of telephones that will be affected by the proposed rules, the evidence favors the conclusion that the costs of the proposed rules outweigh their benefits at this time. However, having founded this conclusion, in large part, on the reliability of the NATA survey, we have also noted that, according to that same survey the number of non-hearing aid compatible telephones still in the working place continues to be reduced by operation of the requirements of the Hearing Aid Compatibility Act of 1988 and Section 68.4(a)(1) of the Rules.[14] At the current rate of depletion, the number of non-hearing aid compatible telephones will be reduced by a predictable amount over the next few years, and the benefits will ultimately outweigh the costs. We conclude that in the case of small establishments, i.e., those with fewer than twenty employees, a delay of two years in the date on which the proposed rules will become applicable will proportionately reduce the size of the universe of telephones affected by the rules to about 4.2 million telephones, and provide that amount of time thought necessary by UTC. With reference to larger establishments, however, i.e., those with twenty or more employees,[15] the cost per instrument would be proportionally smaller, and we believe that a delay of only one year is justified.[16] Therefore, the proposed rules will be adopted with the condition that they not go into effect until May 1, 1993, for establishments with twenty or more employees, and until May 1, 1994, for all others.[17]

FINAL REGULATORY FLEXIBILITY ANALYSIS

21. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis with regard to this *Report and Order* is as follows:

I. Need and purpose of this action:

The regulations affected by this *Report and Order* were required by the Hearing Aid Compatibility Act of 1988. On reexamination of the rules adopted pursuant to that Act, the Commission finds that certain amendments are necessary to fulfill the goals established by Congress.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No additional comments were filed in response to the initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The Commission considered the alternatives raised by the parties in this proceeding and considered all the timely filed comments directed to those issues. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the mandate of the Hearing Aid Compatibility Act and the Communications Act, as amended.

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[14] 47 CFR Section 68.4(a)(1) requires that, with limited exceptions, all telephones manufactured in the United States (other than for export) or imported for use in the United States after August 16, 1989, be hearing aid compatible.

[15] This employment-size demarcation is used by UTC in its comments. (UTC Comments, at 5).

[16] A delay in the effective date of one year from May 1, 1992 is reasonable to allow sufficient time to comply with this *Report and Order*.

[17] We reject UTC's contention that our rationale in adopting the proposed rules could apply to residential telephones as well. Obviously such a determination would involve a completely different cost-benefit analysis. Moreover, in addition to disseminating our own public notices, we will work with the USTA to assure that the rules we adopt today are sufficiently publicized.

ORDERING CLAUSE

22. IT IS ORDERED, pursuant to Sections 1, 4(i) and 710 of the Communications Act, 47 U.S.C. Sections 151,154(i) and 610, that Part 68 of the Commission's Rules and Regulations is amended as set forth in the Appendix below.[18] (effective 30 days after publication in the Federal Register).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 68, is amended as follows:

1. The authority citation for Part 68 is revised to read as follows:

Authority: Secs. 1, 4, 5, 201-205, 208, 215, 218, 226, 303, 313, 314, 403, 404, 410, 602, 710 (47 U.S.C. 151, 154, 155, 201-205, 208, 215, 218, 226, 303, 313, 314, 403, 404, 410, 522, 610).

2. Section 68.4 is amended by revising paragraph (a)(2) to read as follows:

§ 68.4 Hearing aid-compatible telephones.

(a) * * *

(2) Unless otherwise stated and except for telephones used with public mobile services, telephones used with private radio services and secure telephones, every telephone listed in Section 68.112 must be hearing aid-compatible.

*****

3. Section 68.112 is amended by removing paragraphs (c)(1), (c)(3) and (c)(4); revising and redesignating paragraph (c)(2) as paragraph (c); adding paragraph (b)(5) and revising paragraphs (b)(1) and (b)(3) to read as follows:

Section 68.112 Hearing aid-compatibility.

*****

(b) *Emergency use telephones.* Telephones "provided for emergency use" include the following:

(1) Telephones in places where a person with impaired hearing might be isolated in an emergency, including, but not limited to, elevators, automobile, railroad or subway tunnels, highways and all areas of the workplace including common areas (libraries, reception areas and similar locations where employees are reasonably expected to congregate). With respect to the workplace, non-common area telephones are not required to be hearing aid compatible until May 1, 1993 for establishments with twenty or more employees, and until May 1, 1994 for all other establishments, except for telephones made available to a hearing impaired employee for use by that employee in his or her employment duty. Such telephones shall be hearing aid-compatible by May 1, 1992.

*****

(3) Telephones needed to signal life-threatening or emergency situations in confined settings, including but not limited to, rooms in hospitals, residential health care facilities for senior citizens, convalescent homes, and prisons. If an alternative means of signalling life-threatening or emergency situations is available, a hearing aid-compatible telephone is not required until May 1, 1993 for establishments with twenty or more employees, and until May 1, 1994 for all other establishments, unless replaced before that time.

*****

(5) Until May 1, 1993 for establishments with twenty or more employees, and until May 1, 1994 for all other establishments, telephones in hotel and motel rooms replaced after January 1, 1985, must be hearing aid-compatible unless at least ten percent of the rooms in a hotel or motel are equipped to accommodate a hearing impaired customer. A room is equipped to accommodate a hearing impaired customer if

(i) it contains a permanently installed hearing aid-compatible telephone: or

(ii) it contains a telephone which will accept a plug-in hearing aid-compatible handset, which shall be provided to the hearing impaired customer by the hotel or motel; or

(iii) the room contains a jack into which a hearing aid-compatible telephone provided to the customer by the hotel or motel may be plugged (i.e., in addition to a permanently installed telephone which is not hearing aid compatible). If fewer than ten percent of the rooms in a hotel or motel are hearing aid-compatible, when replacing a telephone the hotel or motel must, until the ten percent minimum is reached:

(A) replace it with a hearing aid compatible telephone, or

(B) procure and maintain a plug-in hearing aid-compatible telephone handset which it will provide to a hearing impaired customer upon request at check-in. For establishments with twenty or more employees, all telephones in hotel and motel rooms are required to be hearing aid-compatible by May 1, 1993.

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[18] Nothing in this *Report and Order* is intended to change the requirements of our *Report and Order* in *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, 6 FCC Rcd 4657 (1991), CC Docket No. 90-71, pursuant to the Americans with Disabilities Act of 1990, S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

For establishments with fewer than twenty employees, all telephones in hotel and motel rooms are required to be hearing aidcompatible by May 1, 1994.

(C) *Telephones frequently needed by the hearing impaired.* Closed circuit telephones, i.e., telephones which cannot directly access the public switched network, such as telephones located in lobbies of hotels or apartment buildings; telephones in stores, which are used by patrons to order merchandise; telephones in public transportation terminals which are used to call taxis or to reserve rental automobiles, need not be hearing aid-compatible until replaced.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Mobilecomm of
Virginia, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKI203 in
the Common Carrier Domestic
Public Land Mobile Radio
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 20, 1992; Released: June 5, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Mobilecomm of Virginia, Inc., Jackson, Mississippi, a licensee in the Commission's common carrier Domestic Public Land Mobile Radio Service, call sign KNKI203. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. Mobilecomm of Virginia, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *modified in part of recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mobilecomm of Virginia, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mobilecomm of Virginia, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Mobilecomm of Virginia, Inc., 1500 Capital Towers Building, Jackson, Mississippi 39201.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

American Paging, Inc.
(of Virginia)

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKD914 in
the Common Carrier Domestic
Public Land Mobile Radio
Services at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 5, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against American Paging, Inc. (of Virginia), Minneapolis, Minnesota, a licensee in the Commission's common carrier Domestic Public Land Mobile Radio Services, call sign KNKD914. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. American Paging, Inc. (of Virginia), therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that American Paging, Inc. (of Virginia) IS APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules. 47 C.F.R. Section 1.80(f)(3), that American Paging, Inc. (of Virginia) shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to American Paging, Inc. (of Virginia), 1300 Godward Street, N.E., 3100, Minneapolis, Minnesota 55413.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

American Beeper
Associates, Ltd. Partners

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKL636 in
the Common Carrier Domestic
Public Land Mobile Radio
Service at Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 5, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against American Beeper Associates, Ltd. Partners, Columbia, Maryland, a licensee in the Commission's common carrier Domestic Public Land Mobile Radio Service, call sign KNKL636. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. American Beeper Associates, Ltd. Partners, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that American Beeper Associates, Ltd. Partners IS APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that American Beeper Associates, Ltd. Partners shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to American Beeper Associates, Ltd. Partners, 8325 Guilford Road, Suite A, Columbia, Maryland 21046.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-139

In the Matter of

Amendment of Section 90.21 of the Commission's Rules to Provide for Higher Power Output on Certain Fire Radio Service Frequencies — RM-6711

REPORT AND ORDER

Adopted: May 22, 1992; Released: June 5, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Section 90.21 of the Rules to increase the transmitter power limitation on the Fire Radio Service frequency 153.83 MHz, from 10 watts to 100 watts, and to restrict the frequency to mobile use only. This rule change will promote greater flexibility and efficiency in on-the-scene fire-fighting communications.

II. BACKGROUND

2. The frequency 153.83 MHz is designated for both mobile and fixed use.[1] At the time 153.83 MHz was allocated, the Commission intended that it be reserved for use as a common frequency for on-the-scene fire-fighting communications between hand-held portable radios. Therefore, to be consistent with the transmitter powers available at that time in portable radios, the transmitter power of 153.83 MHz was restricted to a maximum of 10 watts. Because of this limitation, however, the use of 153.83 MHz has generally been operationally limited to portable-to portable communications.

3. In a joint petition, the International Association of Fire Chiefs Inc. and the International Municipal Signal Association (IAFC/IMSA) requested that the Commission's Rules be amended to increase the maximum authorized power on 153.83 MHz from 10 watts to 100 watts.[2]

Notice of Proposed Rule Making

4. In May 1991, the Commission released a *Notice of Proposed Rule Making* (*Notice*) that (1) proposed to increase the maximum authorized transmitter power on 153.83 MHz from 10 watts to 100 watts, thus allowing the frequency to be used in higher-power vehicular mobile units; and (2) proposed to eliminate the fixed use designation, thus limiting the frequency to mobile use.[3] The intent of the proposed rule changes was to provide fire-fighters with the operational flexibility to improve their on-the-scene fire fighting communications by permitting higher powered vehicular mobile units to use 153.83 MHz for communicating with hand-held portables or other vehicular mounted radios.

5. The *Notice* requested comments on whether the frequency coordination process would provide adequate safeguards against potential interference due to the higher transmitter power. Also, because two other Fire Radio Service frequencies, 33.42 MHz and 46.30 MHz, have the same power and use limitations as 153.83 MHz, the *Notice* requested comments on whether the power and use limitations for these two frequencies should be retained or amended so as to be consistent with any changes adopted for 153.83 MHz. Comments on the *Notice* were received from IAFC/IMSA, the Associated Public-Safety Communications Officers, Inc. (APCO), and the Eau Claire, Wisconsin Fire Department (Wisconsin).

III. DISCUSSION

Transmitter Power Increase

6. The commenters support our proposal to increase the maximum authorized power for 153.83 MHz from 10 watts to 100 watts.[4] Fire fighting vehicles generally employ radios that operate at fixed output powers in excess of 10 watts, and thus such vehicles cannot utilize this frequency. The current 10-watt power limitation, therefore, effectively restricts the use of 153.83 MHz to low-power, hand-held portable radios. Increasing the maximum permissible power output for 153.83 MHz will enable its use in vehicular mobile units, such as those installed in fire-fighting vehicles, and will allow both portable-to-portable and mobile-to-portable communications needed during on-the-scene fire communications. We are therefore amending Section 90.21(c)(1) of the Rules to increase the maximum allowable transmitter power for equipment operating on 153.83 MHz to 100 watts.

Frequency Use Limitation

7. When the frequency 153.83 MHz was allocated, the Commission intended that it be reserved for use as a common frequency for fire scene operations. Section 90.21 of the Rules, 47 C.F.R. § 90.21, does not reflect this fact, however, and designates the frequency for both mobile and fixed use. Consequently, over the years, 153.83 MHz has been utilized by licensees for a variety of general low-power operations. The *Notice* reiterated the Commission's desire to maintain 153.83 MHz for its original intended purpose of on-the-scene fire-fighting communications and

[1] *See* Notice of Proposed Rule Making, Docket 20869, 60 FCC 2d 8 (1976), and Report and Order, Docket 20869, 61 FCC 2d 910 (1976).

[2] The petition appeared on public notice April 3, 1989.

[3] Notice of Proposed Rule Making, PR Docket No 91-139, 6 FCC Rcd 3426 (1991).

[4] Comments of IAFC/IMSA at 2 and Wisconsin at 1. APCO at 4, agrees that higher power may be needed in some instances, but states that current operations on 153.83 MHz, operating in accordance with regional plans and with 10 watts power output, require protection from potential high-power users.

proposed to restrict 153.83 MHz to mobile only use by eliminating the fixed use designation indicated in Section 90.21.

8. Comments were divided on this proposal. IAFC/IMSA opposes deleting the fixed use designation, stating that frequency coordination has worked well to preclude conflicting fixed and mobile operations.[5] Wisconsin recommends that both fixed and base station operations not be permitted on 153.83 MHz so as to maintain its effectiveness as a fire-scene frequency.[6] APCO, on the other hand, concurs with limiting the higher power usage to mobile use only.[7] Additionally, APCO comments that it is common practice throughout the public safety radio services to utilize frequencies in what is deemed the best manner, and that there are a large number of base stations, including mobile relay stations, presently licensed on mobile-only frequencies.[8]

9. In keeping with the Commission's original intention for the use of the frequency, we are amending Section 90.21 of the Rules to delete the fixed use designation for 153.83 MHz. It would be overly restrictive to limit 153.83 MHz exclusively to on-the-scene fire-fighting operations. By not allowing future fixed use and by limiting the use of 153.83 MHz to mobile operations, however, we provide the necessary flexibility for improved fire communications with minimal risk of interference. Stations currently authorized to use 153.83 MHz for fixed operations will be permitted to continue such operations indefinitely, but with a maximum transmitter power of 10 watts.

Frequency Coordination

10. The *Notice* requested comments on whether the current coordination process provides adequate safeguards against interference on this frequency.[9] APCO comments that a number of regional emergency communications plans exist that utilize 153.83 MHz consistent with the present 10-watt transmitter power limitation, and that this use could be endangered by indiscriminate high-power operations on 153.83 MHz.[10] IAFC/IMSA states however, that the current coordination process is adequate to protect low-power users of 153.83 MHz.[11]

11. Indiscriminate high-power use of 153.83 MHz could cause interference to co-channel operations, and proper frequency coordination is necessary to minimize the potential for such interference. In light of the comments of APCO and IAFC/IMSA that a successful frequency coordination process has been and will continue to be used to protect licensees on 153.83 MHz, we conclude that the existing coordination procedures along with the rules that we are adopting in this proceeding will enable more efficient fire-fighting communications with minimum interference.

Inclusion of 33.42 MHz and 46.30 MHz

12. Two low-band Fire Radio Service frequencies, 33.42 MHz and 46.30 MHz, have the same power and use restrictions as 153.83 MHz. The *Notice* requested comments on whether the 10-watt power limitation for these frequencies should be retained, or if regulations for these frequencies should be modified to be consistent with changes proposed for 153.83 MHz.[12]

13. IAFC/IMSA expresses support for increasing the power on these frequencies, arguing that while low-band frequencies are not utilized as heavily in urban environments as are the 150 MHz frequencies, the rationale for increasing the power on 153.83 MHz supports a similar increase in power on these two frequencies as well.[13] APCO states that although the two low-band frequencies were not a part of the petitioner's request, APCO does not view them in any different light, and their comments on 153.83 MHz apply equally to the additional frequencies.[14]

14. Although our original proposal contemplated the possibility that the 33.42 MHz and 46.30 MHz frequencies could have the same power and use restrictions as 153.83 MHz, our own further analysis of this issue has convinced us that these frequencies should remain subject to existing operational limitations. We acknowledge that the comments express support for increasing the power limitation on the two frequencies, but upon reconsideration of the issue, we conclude that any increase in power could be detrimental to communications on these frequencies. Transmissions from radios operating in the 30-50 MHz band are subject to a propagation phenomenon known as "signal skip", which can result in interference to co-channel receivers hundreds of miles distant. Because of this propagation characteristic, increasing the power on the two frequencies in this band to 100 watts could greatly increase the potential for long-distance co-channel interference. Additionally, although frequency coordination is required for frequencies in the 30-50 MHz band, coordination in this band may not be as effective as coordination in higher frequency bands because of signal skip.[15] We conclude, therefore, that to minimize the potential for such interference, and to maintain reliable on-the-scene fire communications, it would be best to retain the current 10-watt transmitter power limitation and use restriction on 33.42 MHz and 46.30 MHz.

IV. CONCLUSION

15. We are adopting rules in this proceeding that permit increased transmitter power on the Fire Radio Service frequency 153.83 MHz, and limit the use of this frequency to mobile use. These amendments to the Commission's Rules will permit increased on-the-scene fire-fighting communications capability between mobile and portable units, thus enabling more efficient use of the spectrum and increased benefit to the public.

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[5] Comments of IAFC/IMSA at 3.
[6] Comments of Wisconsin at 3.
[7] Comments of APCO at 3.
[8] Section 90.173(h) permits base stations in the Public Safety Radio Services to operate on a secondary basis on frequencies below 450 MHz that are available to mobile stations.
[9] *Notice* at paragraph 4.
[10] Comments of APCO at 3.
[11] Comments of IAFC/IMSA at 3.
[12] *Notice* at paragraph 5.
[13] Comments of IAFC/IMSA at 3.
[14] Comments of APCO at 4.
[15] Commenters supporting increased power on these two frequencies did not address the matter of signal skip.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

Need and purpose of this action:

16. The Commission is adopting this Report and Order to limit 153.83 MHz to mobile use and to increase the allowable transmitter power for this frequency from 10 watts to 100 watts. This action will result in more efficient on-the-scene fire fighting communications.

Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

17. No comments addressed our Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected:

18. None.

VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90 is AMENDED as set forth in the Appendix.

20. IT IS FURTHER ORDERED that this Report and Order will be effective [thirty days after publication in the Federal Register].

21. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

22. For further information regarding this Report and Order, contact Eugene Thomson, Rules Branch, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 and 332 unless otherwise noted.

2. 47 C.F.R. § 90.21 is amended by revising the entry for 153.83 in the table in paragraph (b) and by adding paragraph (c)(18) to read as follows.

§ 90.21 Fire Radio Service

* * * * *

(b) * * *

Frequency or band	Class of station(s)	Limitations
* * * * *		
153.83	Mobile	18
* * * * *		

(c)* * *

(18) The maximum output power of any transmitter authorized to operate on this frequency shall not exceed 100 watts. Stations authorized prior to [effective date of rule] for fixed operations will be permitted to continue such operations, but at a maximum transmitter power output of 10 watts.

* * * * *

3. 47 C.F.R. § 90.555 is amended by revising the entry for 153.830 in the table in paragraph (b) to read as follows:

§ 90.555 Combined Frequency Listing.

* * * * *

(b)* * *

Frequency	Services	Special Limitations
* * * * *		
153.830	PF	Max. Power 100 W.
* * * * *		

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell and
Nevada Bell

Comparably Efficient
Interconnection Plan for
Voice Mail Services

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1992; Released: May 29, 1992

By the Chief, Common Carrier Bureau:

1. On July 2, 1987, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] Pacific Bell and Nevada Bell (Pactel) filed a Comparably Efficient Interconnection (CEI) Plan for Voice Mail Services (VMS). In February 1988, the Commission conditionally approved Pactel's CEI plan for VMS.[2] On May 1, 1992, Pactel filed an Amendment to its CEI plan for VMS, proposing to offer informational messages to its VMS subscribers. No comments were filed on the Amendment. In this Order, we approve the Amendment.

2. Pactel seeks authority to provide informational messages to groups of subscribers in connection with its VMS. Pactel states that it will provide VMS subscribers with daily informational group messages on headline news, sports, business, and may also provide weather reports, stock quotes, and entertainment news stories. Pactel adds that, in the future, it may provide VMS subscribers with specific information, such as final scores for a particular sporting event.[3]

3. Pactel states that under its approved VMS plan, subscribers are able to send and receive personal and informational messages to groups as well as individuals. According to Pactel, the informational messages proposed in its Amendment will be addressed, recorded, delivered, and retrieved in the same way as any other group voice mail message. Pactel states that either it or its agent will access the voice mail system and address the message to a group of subscribers designated by a specific group code. Pactel states that after the message is addressed, the message will be recorded, sent, and stored in the voice mail machine. According to Pactel, subscribers with the designated group code will be able to retrieve the message at their convenience.[4]

4. Pactel argues that its proposed informational group messaging service does not raise any new CEI issues. Pactel states that its voice mail equipment allows Pactel to send messages to its subscribers, such as administrative messages on scheduled service downtime. Pactel states that there is no difference in the manner in which subscribers send group messages to each other and the manner in which Pactel sends group messages. In offering the service, Pactel does not plan to use any new or changed network services.[5] Pactel states that its proposed service will not alter the interconnection of its VMS with the network or group message capabilities described in its VMS CEI Plan previously approved by the Commission. Pactel adds that the new service will not have any effect on Pactel's continued compliance with all of the Commission's CEI requirements.

5. *Computer III*, as reinstated in the *BOC Safeguards Order*,[6] requires a Bell Operating Company (BOC) that wishes to offer an enhanced service on an integrated basis, prior to the removal of the structural separation requirement, to submit and obtain approval of a CEI plan for that service. When a BOC adds a new enhanced service related to services provided under an approved CEI plan, the BOC is required to file an Amendment to its CEI plan. In the *Pactel VMS Order*, the Commission found that Pactel's initial Plan for VMS complied with the CEI parameters, CEI pricing requirements, and the other nonstructural safeguards described in the *Phase I Order*.[7] Based on the information provided in the Amendment, we conclude that Pactel has satisfied these requirements with respect to the provision of the group informational message service in conjunction with its VMS, and we therefore approve the Amendment.

6. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, Pactel's Amendment to its CEI Plan for VMS as described herein, IS APPROVED.

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, (*Computer III*), CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) (*California*); Phase II, CC Docket No. 85-229, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *Phase II Order vacated* California v. FCC, 905 F. 2d 1217 (9th Cir. 1990) *pet. for rev. pending* of *Phase II Order* and *Phase II Reconsideration Order*, BellSouth Corp. v. FCC, (9th Cir. No. 88-7290, filed April 20, 1988).

[2] *See* Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services, 3 FCC Rcd 1095 (1988) (*Pactel VMS Order*).

[3] Pactel Amendment at 2.

[4] Pactel Amendment at 3.

[5] Pactel adds that third party voice mail providers may also provide the same features to their subscribers without any additional or changed network services. Pactel Amendment at 3.

[6] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending*, *pets. for rev. pending*, People of the State of California and California Public Utilities Commission v. FCC (9th Cir. No. 92-70083, filed Feb. 14, 1992), MCI Telecommunications Corp. v. FCC and USA (DC Cir. No. 92-1075, filed Feb. 19, 1992, People of the State of New York and New York Public Service Commission v. FCC (2d Cir. No. 92-4032, filed Feb. 28, 1992.)

[7] *Phase I Order*, 104 FCC 2d at 1019-1059.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Tariff F.C.C. Nos. 1, 2, 13 and 14 Transmittal No. 4099

ORDER

Adopted: May 29, 1992; Released: May 29, 1992

By the Chief, Common Carrier Bureau:

1. On May 15, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 1, 1992 on 17 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing revises rates for various AT&T business services, including raising rates and increasing discounts for Software Defined Network Service.

2. On May 22, 1992, the Interexchange Resellers Association filed a petition to deny, or in the alternative, suspend and investigate Transmittal No. 4099 and the Telecommunications Marketing Association filed a petition to suspend or reject Transmittal No. 4099.[2]

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4099 and the petitions. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to deny, or in the alternative, suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1, 2, 13, and 14, Transmittal No. 4099 filed by the Interexchange Resellers Association, and the petition to suspend or reject AT&T Communications Tariff F.C.C. Nos. 1, 2, 13, and 14, Transmittal No. 4099 filed by the Telecommunications Marketing Association, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

[2] On May 26, 1992, Group Long Distance, Inc. (GLD) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal No. 4099. Pursuant to Section 1.773(a)(2)(i) of the Commission's Rules, 47 C.F.R. §1.773(a)(2)(i), petitions were due no later than May 22, 1992. Therefore, we will not consider GLD's petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Mobilefone
Services, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KPE364 in the
Common Carrier Domestic
Public Land Mobile Radio
Service at Ben Bolt, TX

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 4, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Mobilefone Services, Inc., a licensee in the Commission's Common Carrier Domestic Public Land Mobile Radio Service, call sign KPE364. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna structures. 47 C.F.R. Sections 17.27, 17.48(a).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located near Ben Bolt, Texas, at latitude N-27-39-04, longitude W-098-02-30 on August 18 and 19, 1991. The inspection disclosed that the middle beacon and a sidelight located three-fourths of the way up the antenna were not operating. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the lights were extinguished. The Commission's records show that Mobilefone Services, Inc. is licensed to operate a radio transmitter from that antenna structure.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.27 of the Commission's rules sets forth requirements for the lighting of antenna structures within a certain height range. The tower here at issue fell within that range, but was not fully lighted so as to be in compliance with section 17.27. *See* 47 C.F.R. Section 17.27. In addition, section 17.48(a) of the rules requires a licensee to notify the Federal Aviation Administration where tower lights function improperly or are extinguished, which Mobilefone Services, Inc. failed to do. *See* 47 C.F.R. Section 17.48(a). Mobilefone Services Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of the tower and requiring that the FAA be notified if lights malfunction.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *See Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mobilefone Services, Inc. is APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mobilefone Service, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Mobilefone Services Inc., 1250 Connecticut Ave., NW, Suite 401, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

T-Com, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKD735 in
the Common Carrier Domestic
Public Land Mobile Radio Service
at Ben Bolt, TX

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 4, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against T-Com, Inc., a licensee in the Commission's Common Carrier Domestic Public Land Mobile Radio Service, call sign KNKD735. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna structures. 47 C.F.R. Sections 17.27, 17.48(a).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located near Ben Bolt, Texas, at latitude N-27-39-04, longitude W-098-02-30 on August 18 and 19, 1991. The inspection disclosed that the middle beacon and a sidelight located three-fourths of the way up the antenna were not operating. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the lights were extinguished. The Commission's records show that T-Com, Inc. is licensed to operate a radio transmitter from that antenna structure.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.27 of the Commission's rules sets forth requirements for the lighting of antenna structures within a certain height range. The tower here at issue fell within that range, but was not fully lighted so as to be in compliance with section 17.27. *See* 47 C.F.R. Section 17.27. In addition, section 17.48(a) of the rules requires a licensee to notify the Federal Aviation Administration where tower lights function improperly or are extinguished, which T-Com, Inc. failed to do. *See* 47 C.F.R. Section 17.48(a). T-Com, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of the tower and requiring that the FAA be notified if lights malfunction.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *See Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that T-Com, Inc. is APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that T-Com, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to T-Com, Inc., P.O. Box 3005, Jackson, Michigan 49204.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

American Paging, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNKB573 in
the Common Carrier Domestic
Public Service at
Churchville, MD

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 4, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against American Paging, Inc., Roseville, Minnesota, a licensee in the Commission's Private Land Mobile Radio Service, call sign KNKB573. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Sec. 17.23 and 17.50), the lighting of radio antenna towers (47 C.F.R. Sec. 17.26) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sec. 17.23 and 17.50. American Paging, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing FAA notification regarding malfunctioning lights and the painting of towers.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a common carrier licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that American Paging, Inc., IS APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that American Paging, Inc., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to American Paging, Inc., 2780 Snelling Avenue, N. 304, Roseville, Minnesota.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Alexander Mitchell
Communications Corp.

Notice of Apparent Liability
for Forfeiture Penalty for
Broadcast Radio Station WSKS-FM,
Milledgeville, Georgia

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1992; Released: June 5, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Alexander Mitchell Communications Corp., Milledgeville, Georgia, licensee of Broadcast Radio Station WSKS-FM, Milledgeville, Georgia. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna towers (47 C.F.R. Sec. 17.25) and notification to the FAA if tower lights malfunction (47 C.F.R. Sec. 17.48(a)). *See also* 47 C.F.R. Sec. 17.47(a)(1).

2. The Commission's Atlanta, Georgia Office inspected a radio antenna structure located on Georgia Route 22, 1.5 miles northeast of Devereux, Georgia, latitude N33-13-36, longitude W083-03-09, on August 13, 1991. The inspection disclosed that all of the lights were out on the antenna structure. The inspection further revealed that the Federal Aviation Administration had not been notified that the lights had been extinguished. Commission records reflect that WSKS-FM is licensed on that tower further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.25 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Sec. 17.25. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Sec. 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Sec. 17.48(a). Alexander Mitchell Communications Corp., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of radio antenna structures and FAA notification regarding malfunctioning lights.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *Deregulation-Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base amount of a monetary forfeiture penalty for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Alexander Mitchell Communications Corp. IS APPARENTLY LIABLE FOR A FORFEITURE of $8,000 for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Alexander Mitchell Communications Corp. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Any written response regarding why the forfeiture should be reduced or not imposed should be sent to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Alexander Mitchell Communications Corp., 3001 Heritage Road, Box 832, Milledgeville, Georgia 31061.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-66

In the Matter of

Amendment of Part 90 Concerning	RM-6146
Secondary Fixed Operations in	RM-6361
the 450-470 MHz Band	

REPORT AND ORDER

Adopted: May 22, 1992; Released: June 5, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Part 90 of our Rules to make the frequencies in the 450-470 MHz band designated for secondary fixed operations available to a greater number of Part 90 eligibles and to modify the frequency coordination requirements for secondary fixed use of frequencies in this band. These rule changes will ensure more efficient use of the spectrum and will reduce the time and expense for frequency coordination of secondary fixed assignments.

II. BACKGROUND

2. To meet the nation's mobile communications needs, the Commission, in 1949, allocated spectrum for private use in the 30-50 MHz, 150 MHz, and 450 MHz bands.[1] The primary purpose of Part 90 frequencies was and continues to be land mobile communications. Our rules, however, make allowances for fixed use of certain frequencies, but only on a secondary basis to mobile operations.[2] Section 90.261 of the Rules, 47 C.F.R. § 90.261, specifically identifies frequencies in the 450-470 MHz band that may be assigned for fixed use to eligibles in one radio service category (e.g., the Public Safety Radio Services) on a secondary basis to primary land mobile users operating in another radio service category (e.g., the Industrial and Land Transportation Radio Services).[3] Thus, frequencies in this band available for secondary fixed use in one radio service are generally the same frequencies available for mobile use on a primary basis in another radio service. The purpose of Section 90.261 was to provide some needed spectrum for fixed operations while, at the same time, to ensure that the 450-470 MHz band is used primarily for mobile operations.[4]

Notice of Proposed Rule Making

3. On March 14, 1991, we adopted a *Notice of Proposed Rule Making* (*Notice*)[5] that proposed to increase the number of 450-470 MHz private land mobile frequencies available to applicants for secondary fixed use and to simplify the coordination requirements for applicants requesting such frequencies.[6] Generally, the *Notice* proposed to:

> (1) allow, with certain exceptions, secondary fixed operations on *all* frequencies now allocated to Part 90 eligibles in the 450-470 MHz band for mobile service use, including in-service mobile frequencies (*See* footnote 3, *supra*);
>
> (2) eliminate the requirement for interservice coordination of applications for secondary fixed use of the 450-470 MHz frequencies by allowing such applications to be coordinated by the home coordinator without concurrence by the primary coordinator;
>
> (3) authorize secondary fixed operations in both urban and rural areas (now allowed only in rural locations) and at reduced transmitter power levels. Additionally, the *Notice* invited comment on whether the Section 90.267 offset frequencies should be included as part of the provisions of Section 90.261, and whether the single-coordinator approach should be adopted in coordinating the Section 90.267 offset frequencies[7]

Comments

4. Eleven comments and eight replies were filed in

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[1] *See generally* General Mobile Radio Service, Report and Order, Docket No. 8658, 13 FCC 1190 (1949).

[2] Radio licensees operating on a secondary basis must cease operations if their transmissions interfere with the mobile operations of primary users of private land mobile spectrum.

[3] This is referred to as "out-of-service" frequency use. On the other hand, "in-service" frequency use is the use by an applicant/licensee of those frequencies assigned to the radio service in which the applicant is eligible.

[4] *See* Further Notice of Proposed Rule Making, Docket No. 13847, 10 FCC 2d 885 (1967), and Second Report and Order, Docket No. 13847, 11 FCC 2d 648 (1968).

[5] Notice of Proposed Rule Making, PR Docket No. 91-66, 6 FCC Rcd 1800 (1991).

[6] Certified frequency coordinators provide coordination services and recommend the most appropriate frequency for Part 90 license applicants. Out-of-service frequencies used in the implementation of Section 90.261 are shared by several service categories. Section 90.175 therefore requires, as part of the frequency coordination process for shared frequencies, that concurrence be acquired from all relevant coordinators. Section 90.176 establishes interservice sharing coordination procedures that now are followed where concurrence from more than one coordinator is required. For purposes of this discussion, we designate as the "home coordinator" the coordinator for the radio service in which the applicant is eligible and as the "primary coordinator" the coordinator of the frequency that the applicant seeks to use for secondary fixed purposes. Because some primary mobile service frequencies are shared by several radio services, there may be several primary coordinators.

[7] The § 90.267 offset frequencies were specifically established to provide additional frequency relief in the 450-470 MHz band for systems that do not require high transmitter powers for mobile or fixed operations.

response to the *Notice*.[8] Virtually all commenters support our proposal to expand use of the 450-470 MHz frequencies for secondary fixed operations. Opinion is divided, however,, on whether and how the current coordination requirements for secondary fixed use should be modified. Commenters uniformly agree that transmitter power should be reduced for stations operating on a fixed basis and most agree that the current geographical limitations should be modified.

III. DISCUSSION

Expanded Availability of Frequencies

5. A basic issue in this proceeding is whether the Commission should permit the use of in-service 450-470 MHz mobile service frequencies for secondary fixed operations. Section 90.261 was established in 1968 to provide some out-of-service spectrum for fixed operations on a secondary basis and, at the same time, to ensure that the 450-470 MHz band would continue to be used primarily for mobile operations. Over the years, licensees have developed an increased need for both land mobile and fixed systems. Increasing the number of frequencies available for secondary fixed use, therefore, would provide applicants with additional resources to meet their diverse communications requirements.

6. As discussed in paragraph 2, Section 90.261 provides for secondary fixed use on frequencies allocated for primary use in radio services other than the service in which the applicant is eligible. Under this arrangement, applicants may not request inservice frequencies for secondary fixed operations even though they may be available. To increase the number of available frequencies for secondary fixed use, the *Notice* proposed to amend Section 90.261 to provide that, with certain specific exceptions, all frequencies in the 450-470 MHz band would be available to all Part 90 eligibles for fixed use on a secondary basis.

7. Most commenters support the proposal to permit eligibles to use in-service frequencies for secondary fixed operations.[9] Therefore, with the exception of certain specific frequencies,[10] we are revising Section 90.261 of the Rules to permit applicants to be licensed on in-service 450-470 MHz for secondary fixed operations.[11] If, because of existing primary mobile service use, in-service frequencies are not available, applicants may be authorized to use any of the frequencies in other pools (i.e., out-of-service frequencies) currently designated for secondary fixed use when specific coordination procedures, as discussed below, are followed.

8. The *Notice* also proposed to include the Business Radio Service frequencies in the 450-470 MHz band among those available to all applicants for secondary fixed use and to include Business Radio Service eligibles among those Part 90 applicants that would be permitted to acquire out-of-service frequencies for secondary fixed use. Business Radio Service frequencies are currently not available for secondary fixed use under the provisions of Section 90.261.[12] NABER comments that neither the petitioners nor the commenters responding to the Petitions requested that Business Radio Service frequencies be included in this proceeding.[13] NABER further argues that the 450-470 MHz Business Radio Service frequencies are saturated in the major urban areas as well as in most rural areas and that our proposal would lead to increased interference regardless of coordination requirements.[14] Because the 450-470 MHz Business Radio Service frequencies are heavily utilized, the chances of such frequencies being available for out-of-service secondary fixed use would, in general, be very slight and would almost certainly be slight in comparison to the number of frequencies that would be

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[8] The *Notice* established May 24, 1991, and June 10, 1991, as the filing dates for comments and reply comments, respectively. Comments were filed by the American Automobile Association, Inc. (AAA), the American Trucking Association (ATA), the National Association of Business and Educational Radio, Inc. (NABER), the Manufacturers Radio Frequency Advisory Committee, Inc. (MRFAC), the Associated Public-Safety Communications Officers, Inc. (APCO), Forest Industries Telecommunications (FIT), the American Petroleum Institute (API), the Utilities Telecommunications Council (UTC), the Special Industrial Radio Service Association, Inc. (SIRSA), the State of Colorado, Division of Telecommunications (Colorado), and the Association of American Railroads (AAR). Reply comments were filed by API, APCO, AAR, MRFAC, SIRSA, UTC, the American Association of State Highway and Transportation Officials Special Committee on Communications (AASHTO), and the Forestry Conservation Communications Association (FCCA).

[9] *See* Comments of AAA at 8, ATA at 2, APCO at 2, API at 6, UTC at 3, SIRSA at 6, FIT at 3, and Reply Comments of AASHTO at 2, and MRFAC at 3. Colorado, in its Comments at 3, suggests an alternative that would not only allow secondary fixed use on all 450-470 MHz frequencies, but would also permit *primary* fixed use of in-service frequencies. Conversely, AAR suggests in its Comments at 7, that in urban areas, because of the heavy use of frequencies for mobile operations, secondary fixed operations should be permitted *only* on frequencies authorized to and used *by* the licensee for its mobile operations. We disagree with the Colorado proposal because permitting co-equal fixed operations on in-service frequencies could interfere with the use of the band for primary mobile operations and the microwave frequencies are far more suited for permanent fixed operations. We disagree with the AAR proposal because in heavily congested urban areas where mobile service frequencies are likely to be shared by several licensees, the addition of a secondary fixed link on a licensee's existing primary frequency could cause interference to other licensees.

[10] Secondary fixed operations would not be permitted on frequencies designated for medical emergency and paging, oil spill, itinerant and railroad slave locomotive use. *See*, for example, §§ 90.65(c)(6), 90.73(d)(4), and 90.91(c)(11).

[11] Use of in-service frequencies for secondary fixed operations is currently prescribed for the Business Radio Service *only*, pursuant to §§ 90.75 (c)(26) and 90.261(d).

[12] Section 90.261(a) makes frequencies in the Industrial Radio and Land Transportation Radio Services available for secondary fixed operations to eligibles in the Public Safety and Special Emergency Radio Services. Section 90.261(c) makes frequencies in the Public Safety and Industrial Radio Services available for secondary fixed operations to eligibles in the Land Transportation Radio Services. Business Radio Service frequencies, however, are not included among the Industrial Radio Service frequencies available for this purpose. Section 90.261(d) provides that only the Business Radio Service frequencies subject to Section 90.75(c)(26) are available for Business Radio secondary fixed use and these frequencies are available *only* to Business Radio Service eligibles.

[13] Comments of NABER at iii.

[14] Comments of NABER at 4.

available in the other Part 90 radio services for out-of-service secondary fixed use. Thus, we conclude that it would serve no useful purpose to risk the possible occurrence of increased interference to Business Radio Service licensees by allowing secondary fixed use of Business Radio Service frequencies by eligibles in the other Part 90 radio services.

9. As for permitting Business Radio Service eligibles to acquire the 450-470 MHz frequencies of *other* radio services for secondary fixed use, we believe that, due to the predominance of the Business Radio Service (in terms of numbers of licensees within the Private Land Mobile Radio Services), there is a strong likelihood that Business Radio Service eligibles, if given the opportunity to obtain out-of-service frequencies, would acquire so many frequencies that few would be left for eligibles in the other radio services without a great potential risk for interference. We therefore find that, in conjunction with our decision to not make Business Radio Service frequencies available to eligibles in *other* radio services for secondary fixed operations, we will not permit Business Radio Service eligibles to *acquire* the frequencies of other Part 90 radio services for such use.

Coordination Procedures

10. The current requirement in Section 90.261 of the Rules to use out-of-service frequencies for fixed operations has resulted in the need for coordination by both home and primary coordinators.[15] The *Notice* proposed to eliminate the multiple coordination of applications for secondary fixed use of the 450-470 MHz frequencies by allowing such applications to be coordinated entirely by the home coordinator. The home coordinator would be required, however, to notify a primary coordinator of a recommendation for secondary fixed use of frequencies in the primary coordinator's radio service.[16]

11. The comments were divided on this proposal. Supporting commenters contend that time and money will be saved and that should interference to primary operations occur, secondary users would be required to cease operation.[17] Opposing commenters state generally that the elimination of interservice coordination for secondary fixed use of the 450-470 MHz frequencies might result in poor frequency recommendations and increased interference to primary users.[18] Opposing commenters additionally argue that considerable effort may be needed to locate and remove interfering secondary fixed users.

12. We agree with the commenters who claim that the potential for interference to primary users of the frequencies could increase without the involvement of a primary coordinator and concur that a procedure is needed to include the primary coordinator in coordinating secondary fixed applications. A primary coordinator may not maintain a data base on the entire 450-470 MHz band and thus must be made aware of potential new secondary users on its primary frequencies. We disagree, however, with the comments suggesting that interservice coordination for secondary fixed use follow the requirements of Section 90.176.[19] Our intent in this proceeding is to simplify the coordination procedures for secondary fixed use applications. The interservice sharing coordination procedures of Section 90.176 are complex and expensive because they are intended for primary frequency recommendations and are overly burdensome for secondary use authorizations where the secondary fixed operation must be discontinued if interference to primary operations results.

13. We are therefore amending Sections 90.175, 90.176 and 90.261 of the Rules to allow applications for 450-470 MHz secondary fixed operations to be coordinated by a *single* coordinator, either an applicant's home coordinator or another certified frequency coordinator. If the home coordinator provides a frequency recommendation, then, as suggested by UTC, and generally addressed by other commenters,[20] the home coordinator will be required first to attempt to recommend an inservice frequency. If an in-service frequency is not available, the home coordinator may then recommend an out-of-service frequency. If an out-of-service coordinator provides a frequency recommendation, the coordinator may *only* recommend a frequency allocated to the service for which the coordinator is certified. Regardless of whether the home coordinator or an out-of-service coordinator is responsible for a frequency recommendation, if an out-of-service frequency is selected, then the coordinator must notify all primary coordinators for that frequency of the recommendation before submitting the application to the Commission. Concurrence by a primary coordinator will not be required, but if a primary coordinator objects to a recommendation, it must notify the coordinator making the frequency recommendation of such objection within 10 working days of certified receipt of the recommendation. We expect that conflicts between coordinators will in most instances be mutually resolved without the need for Commission involvement. The Commission will continue its policy of resolving coordinator disputes when necessary.[21]

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[15] To satisfy the provisions of Section 90.175, which states that coordination of shared frequencies requires the concurrence of the other applicable coordinators, the current practice is to employ the rather strict and onerous frequency coordination procedures of Section 90.176 -- the procedures designated for interservice sharing of 450-470 MHz frequencies. This practice has often resulted in lengthy coordination times and multiple coordination fees for the applicant.

[16] *Notice* at 18.

[17] Comments of AAA at 2, API at 4, SIRSA at 5, and Colorado at 2. Supporting the proposal with emphasis on a home-to-primary coordinator notification procedure were NABER at 8, FIT at 3, UTC at 4, and AAR at 5.

[18] Comments of ATA at 3, MRFAC at 3, APCO at 2, and AASHTO at 4.

[19] Section 90.176 requires that applications for interservice sharing of frequencies in the 450-470 MHz band be accompanied by (1) a determination from the home coordinator that there are no satisfactory frequencies available within the applicant's own radio service in the desired area of operation; (2) a demonstration that the frequency(s) requested in another radio service are not assigned in that radio service in the area of desired operation; (3) a statement from the frequency coordinator having responsibility for the frequency in the radio service in which the frequency is assigned concurring in its assignment in the manner requested; and (4) a statement or showing that the proposed use of the assignment will not violate any of the technical limitations applicable in the service or services in which the frequency is regularly assigned.

[20] Comments of UTC at 8, AAA at 3, NABER at 9, MRFAC at 6, and AASHTO Reply Comments at 1.

[21] *See* Report and Order, Frequency Coordination in the Private Land Mobile Radio Services, PR Docket No. 83-737, para. 26, 103 F.C.C. 2d 1093. Deleting the requirement for primary coordinator coordination for secondary fixed use of the 450-470 MHz frequencies will eliminate any primary coordinator's fee.

Transmitter Power/Geographic Limitations

14. Currently, Section 90.261 limits the use of frequencies for secondary fixed operations to locations 85 or more miles from the center of any urbanized area of 600,000 or more population (1970 Census) with a maximum power level of 350 watts as specified in Section 90.205,[22] except that the distance may be 65 miles if the output power does not exceed 20 watts. Secondary fixed operations are not permitted less than 65 miles from these urbanized areas.[23]

15. In the *Notice*, we stated that we did not wish to rely solely on the secondary status of fixed operations as a means for controlling and minimizing interference potential. Thus, we proposed to reduce the maximum allowable transmitter power for secondary fixed operations from 350 to 75 watts for stations 140 km (87 mi) or more (non-urban), or 20 watts for stations less than 140 km (87 mi) (urban), from the center of any urbanized area of 600, 000 or more population. This proposal would permit secondary fixed use in both non-urban and urban areas where possible, but with reduced power levels.

16. All parties commenting on this issue support our proposal to reduce the current 350 watt transmitter power limit for non-urban stations. Several alternative power levels were suggested. API recommends a reduction to 110 watts, stating that transmitters with this power output are currently available and that many Petroleum Radio Service licensees require this power level to meet their operational objectives.[24] APCO and AASHTO suggest a limit of 100 watts effective radiated power (ERP).[25]

17. Most commenters support our proposal to reduce the maximum authorized transmitter power from 350 to 75 watts for secondary fixed non-urban stations. We are therefore adopting this transmitter power limit for non-urban secondary fixed stations. We disagree with API's suggested 110-watt level because, while some Petroleum Radio Service licensees, particularly those involved in offshore operations, may benefit from higher transmitter power levels, our intent is to generally minimize the potential for interference to all primary land mobile operations, and only through an across-the-board power reduction will this be accomplished. We also believe that establishing an ERP limit is impractical. The current rules require that directional antennas be employed with at least a 15 dB front-to-back ratio.[26] The narrow beamwidth obtained with directional antennas enable a signal to be directed so as to minimize the likelihood for interference to co-channel mobile operations. Licensees, therefore, can now employ highly directional antennas to focus their point-to-point signals in a particular direction over a relatively long distance without causing interference to co-channel mobile systems. Thus, they can achieve a high effective radiated power[27] without employing a high transmitter power. To place a fixed 100-watt limit on ERP, however, would place a fixed limit on signal coverage area below that which is necessary for effective secondary fixed operations.

18. Other commenters indicate that permitting 20-watt stations in urban areas could increase the potential for interference and that secondary fixed operations should continue to be excluded within 65 miles of the centers of urban areas.[28] Because of frequency congestion caused by heavy mobile use, few secondary fixed stations are likely to be coordinated in urban areas. Because fixed use is secondary to mobile use, however, eliminating the mileage restriction and lowering the transmitter power to 20 watts could potentially allow some secondary fixed use in previously unavailable areas and could thus be of benefit to some applicants. We, therefore, are adopting maximum authorized transmitter power levels of 75 watts for secondary fixed stations 140 km (87 mi) or more, and 20 watts for stations less than 140 km (87 mi) from the centers of urbanized areas of 600,000 or more population (1970 Census). We believe this to be a practical solution that will not only reduce interference but will permit potential secondary fixed use in areas where such use was previously not allowed.

Other Matters

19. We also requested comments on whether to include the 450-470 MHz offset frequencies designated in Section 90.267 of the Rules as part of the provisions of Section 90.261, and whether to adopt the single coordinator approach in coordinating the Section 90.267 offset frequencies.[29] The comments unanimously opposed making the Section 90.267 offset frequencies subject to the provisions of Section 90.261.[30] Because the 450-470 MHz offset frequencies are heavily utilized, they are already very prone to co-channel interference. Additionally, Section 90.267(a)(2) provides that the offset frequencies may already be used for fixed purposes on a secondary basis. The action we are taking in this proceeding to make more frequencies available for secondary fixed use will provide some relief for applicants requiring additional fixed frequencies. We see no need to expand availability of the already heavily used offset frequencies. We will therefore leave unchanged our current rules pertaining to the Section 90.267 offset frequencies.

20. To enable the identification of a secondary fixed station that is causing interference to a primary mobile service station, APCO and SIRSA recommend that secondary fixed users be required to use automatic station iden-

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Any costs a primary coordinator voluntarily chooses to incur in contesting a home coordinator's recommendation will be borne by the primary coordinator. We impose no obligation upon the primary coordinator that would require any type of evaluation of the home coordinator's recommendation.

[22] Stations in the Land Transportation Radio Services that operate in the 220-470 MHz frequency band are limited to a transmitter power of 75 watts pursuant to Section 90.205(b).

[23] The centers of the urbanized areas are determined from the U.S. Department of Commerce publication "Airline Distance between Cities in the United States," Appendix, 226.

[24] Comments of API at 7.

[25] Comments of APCO at 7, and Reply Comments of AASHTO at 4.

[26] *See* 47 C.F.R. § 90.261.

[27] Effective radiated power is the product of the transmitter output power and the effective antenna system gain.

[28] Comments of AAA at 4.

[29] *See Notice* at para. 19. These issues were proposed in the Joint Petition for Rule Making submitted in this proceeding by AASHTO, APCO, and FCCA. Section 90.267 governs the use of 12.5 kHz offset frequencies in the 450-470 MHz band.

[30] *See* Comments of NABER at 9, FIT at 4, API at 8, UTC at 10, SIRSA at 8, DOT at 4, and AAR at 9.

tifiers so that interference can be more easily traced.[31] We are well aware that the lack of station identification can make it more difficult to locate an interfering station. While we believe this suggestion has merit, it was not addressed in the *Notice* and thus must be considered beyond the scope of this proceeding.[32]

21. Finally, in its Comments, APCO suggests that it be appointed as sole coordinator for all public safety 450-470 MHz frequencies to simplify the coordination process.[33] This suggestion was opposed by AASHTO and FCCA.[34] Again, this issue was not addressed in either the Petitions or the *Notice* and is thus clearly beyond the scope of this proceeding.

IV. CONCLUSION

22. We are adopting rules in this proceeding that make the frequencies in the 450-470 MHz band designated for secondary fixed operations available to a greater number of Part 90 eligibles and provide for implementation of secondary fixed operations in previously restricted areas. Also, we simplify the coordination procedures and thus reduce coordination costs to applicants for secondary fixed use of these frequencies. These modifications to the Commission's rules will further the efficient use of the spectrum and improve service to the public.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

Need and purpose of this action:

23. The Commission is adopting this *Report and Order* to make available additional 450-470 MHz frequencies for secondary fixed use and to simplify the coordination procedures for these frequencies. This action will minimize the coordination time and expense to an applicant.

Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

24. No comments addressed our Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected:

25. None.

VI. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the Appendix.

27. IT IS FURTHER ORDERED that this *Report and Order* will be effective [thirty days after publication in the Federal Register].

28. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

29. For information regarding this *Report and Order*, contact Eugene Thomson, Rules Branch, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 and 332 unless otherwise noted.

2. 47 C.F.R. §§ 90.17(c)(10), 90.19(d)(15), 90.21(c)(6), 90.23(c)(7), 90.25(c)(13), 90.53(b)(12), 90.63(d)(14), 90.65(c)(27), 90.67(c)(17), 90.73(d)(18), 90.79(d)(12), 90.81(d)(3), 90.89(c)(9), 90.91(c)(9), 90.93(c)(3) and 90.95(d)(7) are revised to read as follows:

The requirements for secondary fixed use of frequencies in this band are set forth in § 90.261.

3. 47 C.F.R. § 90.71 is amended by adding the entry 450-470 MHz to the Relay Press Radio Service Frequency Table in paragraph (b) and adding paragraph (c)(11) to read as follows:

§ 90.71 Relay Press Radio Service.

* * * * *

(b) ***

Frequency or band	Class of station(s)	Limitations
* * * * *		
450-470	Fixed	11
* * * * *		

(c) ***

(11) The requirements for secondary fixed use of frequencies in this band are set forth in § 90.261.

[31] Comments of APCO at n. 2 and SIRSA at 7.

[32] We would, however, entertain a separate, future petition requesting action on this proposal.

[33] Comments of APCO at 6.

[34] Comments of AASHTO at 4 and Reply Comments of FCCA at 1.

* * * * *

4. 47 C.F.R. § 90.173 is amended by removing the words "or 90.261 of the rules" at the end of the sentence in paragraph (j).

5. 47 C.F.R. § 90.175 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 90.175 Frequency coordination requirements.

(a) *** Frequencies in the 450-470 MHz band, when used for secondary fixed operations, shall be assigned and coordinated pursuant to § 90.261.

* * * * *

6. 47 C.F.R. § 90.176 is amended by adding a paragraph (c) to read as follows:

§ 90.176 Interservice sharing of frequencies in the 150-174 and 450-470 MHz bands.

* * * * *

(c) Provisions governing the assignment and use of frequencies in the 450-470 MHz band for secondary fixed operations are provided in § 90.261.

7. 47 C.F.R. § 90.261 is revised to read as follows:

§ 90.261 Assignment and use of the frequencies in the band 450-470 MHz for fixed operations.

(a) Except as provided for in paragraphs (d) and (e) of this section, frequencies in the 450-470 MHz band as listed in the tables of frequencies for the radio services in this Part may be assigned to all eligibles, with the exception of Business Radio Service eligibles, for fixed use on a secondary basis to land mobile operations.

(b) Fixed stations located 140 km (87 mi) or more from the center of any urbanized area of 600,000 or more population are limited to a transmitter output power of 75 watts. Fixed stations less than 140 km (87 mi) from the centers of these areas are limited to a transmitter output power of 20 watts. Urbanized areas of 600,000 or more population are defined in the U.S. Census of Population 1970, Vol. 1, Table 20, pages 1-74. The centers of the urbanized areas are determined from the Appendix, page 226, of the U.S. Department of Commerce publication "Airline Distance Between Cities in the United States."

(c) All fixed systems are limited to one frequency pair with 5 MHz spacing and must employ directional antennas with a front-to-back ratio of 15 dB, except that omnidirectional antennas having unity gain may be employed by stations communicating with a minimum of three receiving locations encompassed in a sector of at least 160^0 in azimuth. Stations authorized for secondary fixed operations prior to (effective date of the rules) may continue to operate under the conditions of their initial authorization.

(d) Frequencies in the Business Radio Service subject to § 90.75(c)(26) will be authorized only to Business Radio Service eligibles. Business Radio Service eligibles may not access frequencies allocated to another radio service for the purposes of conducting secondary fixed operations.

(e) Coordination of assignable frequencies subject to the provisions of this section will be permitted by any certified frequency coordinator. If an applicant elects to obtain a frequency recommendation from the certified frequency coordinator for the service in which the applicant is eligible, the coordinator shall first attempt to recommend a frequency within the applicant's own radio service. If none are available, the coordinator may then recommend a frequency allocated to another radio service. If an applicant elects to obtain a frequency recommendation from a certified coordinator of a service in which the applicant is not eligible, that coordinator may *only* recommend a frequency allocated to the service for which the coordinator is certified. If a coordinator recommends a frequency allocated to a service where the applicant is not eligible on a primary basis, then the coordinator must notify all coordinators certified to recommend that frequency on a primary basis before submitting the application to the Commission. Concurrence by these coordinators will not be required, but if any of these coordinators objects to a recommendation, they must notify the coordinator making the frequency recommendation of such objection within 10 working days of certified receipt of the recommendation.

(f) Secondary fixed operations pursuant to paragraph (a) of this section will not be authorized on the following frequencies:

Frequencies (MHz)

451.800/456.800
452.525
452.550
452.575
452.600

452.925/457.925
452.950/457.950

453.025/458.025
453.075/458.075
453.125/458.125
453.175/458.175

454.000/459.000

462.950/467.950
462.975/467.975
463.000/468.000
463.025/468.025
463.050/468.050
463.075/468.075
463.100/468.100
463.125/468.125
463.150/468.150
463.175/468.175

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of the South
Central Bell Telephone
Company and Southern Bell
Telephone and Telegraph
Company for Waiver to
provide Account Code Billing

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 1992; Released: May 27, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a petition on March 7, 1991, requesting waiver of the Commission's rules in order to enable the BellSouth telephone companies to offer intraLATA toll customers Account Code Billing (ACB) on an integrated basis. At the time BellSouth filed its petition for waiver, the Commission had required a Bell Operating Company (BOC) to obtain a waiver of the *Computer II*[1] requirements if it wished to offer on an integrated basis an enhanced service that was not the subject of a previously approved Comparably Efficient Interconnection (CEI) plan.[2] The Commission has since replaced the *Computer II* safeguards with a strengthened set of nonstructural safeguards. At this time, a BOC wishing to offer a new enhanced service is required to file a CEI plan or a petition for waiver of the CEI requirements, until the conditions for structural relief have been met.[3] In its petition, BellSouth argues that it has presented facts that would support either a *Computer II* waiver, or a waiver of the Commission's *Computer III* CEI requirements. In this Order, we find that BellSouth has shown good cause for a waiver of the Commission's *Computer III* CEI requirements, and therefore we grant the waiver.[4]

II. THE PLEADINGS

2. According to BellSouth's petition, ACB would permit intraLATA customers to "tag" each outgoing intraLATA toll call with a multi-digit account number. As proposed by BellSouth, customers would activate ACB by dialing "0" + the intraLATA area code + the number being called + a two digit service identifier ("XX") + an account code number.[5] According to BellSouth, ACB would not require a BellSouth intraLATA toll customer to presubscribe to the service. Instead, the customer would use the service on an "as needed" basis and would be billed only for actual usage. Finally, BellSouth claims that although ACB would be offered by its operating companies on an integrated basis, all of the costs associated with providing the service will be removed from the operating telephone companies' regulated accounts in accordance with the Commission's Joint Cost rules, and assigned in accordance with the operating telephone companies' approved Cost Allocation Manuals, and the Bureau's Responsible Accounting Officer Letter 16.[6]

3. BellSouth argues that it has no unique basic facilities needed by other enhanced service providers to offer services that compete with ACB services. BellSouth contends that functionally equivalent services are being provided by a number of interexchange carriers and resellers, and through features on many PBXs and other types of customer premises equipment (CPE).[7]

4. BellSouth further contends that imposition of CEI requirements on ACB would not be in the public interest because CEI for ACB would unnecessarily increase costs, would not be useful to other enhanced service providers, and would delay introduction of ACB.[8] An affidavit of BellSouth's Operations Manager estimates that modifying the design of ACB specifically for CEI would cost between $10.5 and $14.8 million and would take two to four years to implement.[9] BellSouth asserts that providing ACB on a "stand-alone" basis, as well as complying with CEI requirements, would require a major overhaul of the TOPS system that would necessitate unbundling the basic net-

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 FCC 2d 384 (1980) (*Final Decision*), *mod'd on recon.*, 84 FCC 2d 50 (1981) (*Computer II Reconsideration Order*), *mod'd on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[2] *See*, Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 174, 191 n.135 (1990).

[3] *See*, Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket 90-623, *Report and Order*, 6 FCC Rcd 7571 (1991).

[4] The petition was placed on public notice April 1, 1991. 6 FCC Rcd 1807 (1991). Comments were filed by the Public Service Commission of the District of Columbia (DC PSC) and the Public Utilities Commission of the State of California (California PUC). Reply comments were filed by BellSouth.

[5] The "XX" portion of the dialing would notify BellSouth's Traffic Operator Position System (TOPS) of ACB feature activation, while the two to four digits following the "XX" would identify the customer's subaccount designation. After dialing is completed, the TOPS switch "tags" the customer-selected account code to the call detail information and routes the call to the telephone company intraLATA toll network for completion.

[6] Responsible Accounting Officer (RAO) Letter 16, 5 FCC Rcd 5947 (1990), *applications for review pending*, People of the State of California and the P.U.C. of the State of California, filed November 16, 1990, Public Service Commission of the District of Columbia, filed November 19, 1990.

[7] BellSouth Petition at 9.

[8] *Id.* at 10-15.

[9] See, BellSouth Petition at 10, 12 and Exhibit 1. According to BellSouth, these estimates do not include the marketing and operations costs associated with offering this service through a separate subsidiary.

work capabilities used by ACB, and would require the development of a new network interface so that customers of competing ACB services could access certain TOPS functionalities.[10] Moreover, BellSouth argues that it alone would have to bear the costs of CEI development since it would be economically impractical for customers of CPE vendors and competing enhanced service providers or resellers to incur the "additional trunking and TOPS interconnection charges necessary to provide the ACB functionality through CEI arrangements." BellSouth maintains that these charges render a stand-alone ACB service inefficient and uneconomical, as compared to other alternatives currently available in the enhanced services marketplace.[11]

5. In contrast to the alleged inefficiencies resulting from the CEI requirements for ACB, BellSouth claims that without CEI, the start-up costs of offering ACB on an integrated basis in the TOPS system are approximately $2.7 to $3.3 million.[12] Moreover, without CEI, BellSouth estimates the service would be available in a matter of months. BellSouth also contends that the Commission has granted waivers for similar services and that this offering merely represents a "me-too" issue.[13]

6. Comments filed by California state that "it is not clear why BellSouth needs any federal waiver authority."[14] California asserts that it does not appear that BellSouth intends to provide any interstate service and urges us to defer consideration of this petition until BellSouth "adequately explains the factual circumstances surrounding the proposed service so that the jurisdictional issue is clarified...."[15] The DC PSC argues that the Commission should "forbear" from exercising federal jurisdiction over BellSouth's ACB service since less than three percent of the total intraLATA toll traffic in its service area is interstate.[16] The BellSouth reply says that California's request to defer "is based upon an incorrect understanding of the facts and the law."[17] BellSouth states that it does expect to offer ACB that will be used in connection with interstate, intralata toll calls.

III. DISCUSSION

7. Under *Computer II*, a BOC must offer enhanced services on a fully separated basis or obtain a waiver of the Commission's rules. Under *Computer III*,[18] the Commission permitted the BOCs to offer enhanced services on an integrated basis, prior to the implementation of Open Network Architecture, pursuant to approved CEI plans. After the vacation of certain *Computer III* decisions,[19] the Commission recently reinstituted CEI requirements for BOC provision of new enhanced services, pending structural relief.[20]

8. We find that BellSouth has made the necessary showing for a waiver of the *Computer III* CEI requirements for the provision of ACB service. It is clear that an efficient offering of ACB service by BellSouth would benefit consumers by providing additional functionality from the telecommunications network. BellSouth has demonstrated with particularity that the offering of ACB in compliance with the CEI requirements would be inordinately expensive. BellSouth does not control a basic service or facility that is unique, essential or even desired by the other competitors for the provision of this type of service, and implementation of CEI would be unduly expensive, particularly in light of the prospect that there would be little or no use of CEI for the ACB services of others. We have granted waivers of CEI requirements in the past for services similar or identical to ACB service.[21] No party has challenged BellSouth's showings. Thus, we believe that any risk of anticompetitive conduct is outweighed by the benefits of making ACB service available to customers. Based on the record compiled in this proceeding, BellSouth has made an adequate showing that ACB service represents a special circumstance justifying a waiver of the CEI requirements.

9. We do not find merit in the jurisdictional claims presented by California and the DC PSC. California's assertion, that BellSouth has no intention to provide ACB to interstate, intraLATA customers is directly refuted by the record, and is therefore factually incorrect.[22] In addition, California's argument that BellSouth's ACB service would be subject to state jurisdiction under the "single exchange exemption" of Section 221(b) of the Communications Act is inapplicable. Section 221(b) reserves to the states authority to regulate local exchange services that cross state

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[10] BellSouth Petition at 11.

[11] In fact, BellSouth contends that no competing vendor offers ACB service on a stand-alone basis and adds that this service is predominantly offered by basic service providers and resellers as a supplemental feature designed to make their basic services more attractive to customers, or by CPE vendors as an additional feature to their call management systems. *Id.* at 13.

[12] *Id.* at 10-11, Exhibit 1 at 5.

[13] BellSouth contends that both the Common Carrier Bureau and the Commission have previously granted waivers for two services -- the BOCs' Customer Dialed Account Recording (CDAR) Service and AT&T's Subaccount Billing Service (SAB) -- that are similar to its ACB Service. BellSouth Petition at 1-2, fns. 2-3. *See* Petitions of the Bell Atlantic Telephone Companies, *et al., MO&O*, Mimeo No. 1606 (1985) (CDAR Waiver Order), Petition of AT&T for Waiver of CEI Requirements of the Third Computer Inquiry, 2 FCC 2d 5149 (1987) (AT&T Subaccount Billing Waiver Order).

[14] California Comments at 2.

[15] California Comments at 2-3.

[16] DC PSC Comments at 1.

[17] BellSouth Reply at 3.

[18] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Computer III*), CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*), *Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *Phase II Order vacated* California v. FCC, 905 F.2d 1217; *pending* petition for review of *Phase II Order* and *Phase II Reconsideration Order*, *BellSouth v. FCC* (9th Circuit No. 88-7290, filed April 20, 1988).

[19] *See*, People of California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

[20] *See* Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket 90-623, *Report and Order*, 6 FCC Rcd 7571 (1991) (effective February 1, 1992).

[21] *See, supra.* n.12.

[22] *See*, BellSouth Petition at 6-7; BellSouth Reply at 3-4.

boundaries. The record shows that the communications at issue are interstate, intraLATA toll communications -- that are provided pursuant to BellSouth's interstate tariffs -- not local exchange services offered pursuant to intrastate tariffs.[23] We also decline to adopt the DC PSC's "forbearance" proposal. The Commission has a history of active involvement in the development of enhanced services as evidenced in our *Computer I, II,* and *III,* and ONA proceedings. The Commission also has declined to forbear generally on the regulation of BOC ONA services.[24] We are not persuaded that forbearance in exercising our authority over this service would be consistent with longstanding policies or would be in the public interest.[25]

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, BellSouth's Petition for Waiver of the CEI requirements for the provision of intraLATA Account Code Billing service is Granted.

11. Accordingly, IT IS FURTHER ORDERED that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[23] *See,* BellSouth Petition at 6, BellSouth Reply at 4. Interstate, intraLATA calls originate in one exchange and terminate in another exchange located in another state, while local exchange services may traverse state lines, but are originated and terminated within the same local exchange service area.

[24] Memorandum Opinion and Order on Reconsideration, Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084, 3089 (1990) (*BOC ONA Recon Order).*

[25] We also note that the Commission has preempted certain state regulation of the BOCs' provision of intrastate enhanced services. *See,* Computer III Remand Proceedings: Bell Operating Company Safeguards, CC Docket No. 90-623, *Report and Order,* 6 FCC Rcd 7571 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-116

In re Applications of

UHURU COMMUNICATIONS, INC. — File No. BRED-910130WF

For Renewal of License
of Station WUCI-FM
Binghamton, New York

and

WSKG PUBLIC TELECOMMUNICATIONS COUNCIL — File No. BPED-910501MB

For a Construction Permit
for a New FM Station
Binghamton, New York

ARROWHEAD CHRISTIAN CENTER — File No. BPED-910501MC

For a Construction Permit
for a New FM Station
Binghamton, New York

HEARING DESIGNATION ORDER

Adopted: May 15, 1992; Released: June 8, 1992

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, has before it for consideration: (a) the application of Uhuru Communications, Inc. (Uhuru) for renewal of license of Station WUCI-FM, Binghamton, New York, and (b) the applications of WSKG Public Telecommunications Council (WSKG) and Arrowhead Christian Center (Arrowhead) for a construction permit for a new FM station on Channel 218A at Binghamton, New York. All three applications are mutually exclusive because WUCI-FM is currently licensed to operate on Channel 218A.

2. *Uhuru's Silence.* By notification dated April 2, 1991, from the Chief, FM Branch, Audio Services Division, Mass Media Bureau, special temporary authorization was granted through July 1, 1991, to permit Station WUCI-FM to remain silent. Since that time the station has been off the air without permission. Additionally, NTIA has reclaimed much of its equipment from WUCI-FM which precludes the licensee's ability to broadcast. Because the licensee has been off the air for an extended period of time without authorization, lacks the equipment to operate the station, does not have Commission permission to remain off the air, and has not turned in its license, it is in apparent violation of 47 C.F.R. §§ 73.1740 and 73.1750. Accordingly, an appropriate issue will be specified against Uhuru.

3. *WSKG's Site Availability.* WSKG proposes to operate at the same site as the renewal applicant. However, in the *First Report and Order In the Matter of Formulation of Rules and Policies... Relating to the Comparative Renewal Process,* the Commission rescinded the *Cameron*[1] presumption, stating "[i]f a renewal challenger is unable to provide reasonable assurance of transmitter site availability this will be designated as an issue in the comparative proceeding." 4 FCC Rcd 4780, 4788-89 (1989). Since WSKG has failed to provide reasonable assurance that Uhuru's site will be available to it, an appropriate issue will be specified.

4. *Environmental Issues.* Our engineering study indicates that all three applicants failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order in Gen. Docket No. 79-163,* 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Therefore, each will be required to file, within 30 days of the receipt of this *Hearing Designation Order,* an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the pro-

[1] In *George E. Cameron Jr. Communications,* 71 FCC 2d 460, 467 (1979), the Commission established the presumption that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding.

visions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments that the proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

5. *Share-time Arrangement.* None of the applicants has indicated whether an attempt has been made to negotiate a sharetime arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement among the applicants will be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. *Petitions to Deny.* On May 1, 1991, WSKG and David A. Martin, Executive Director of Arrowhead, filed petitions to deny Uhuru's renewal application. No oppositions were filed. The petitions are essentially predesignation petitions to specify issues, which are no longer permitted. Accordingly, the petitions to deny will be dismissed. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 214-15 (1979). These issues can be raised before the presiding Administrative Law Judge as may be appropriate.

7. Except as may be indicated by any issues specified below, the applicants are qualified to operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding upon the issues specified below.

8. Accordingly, IT IS ORDERED, that pursuant to § 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Uhuru has violated 47 C.F.R. §§ 73.1740 and/or 73.1750, and, in light of the evidence adduced, whether Uhuru is qualified to be and remain a licensee of the Commission.

2. To determine whether WSKG has reasonable assurance of the availability of its proposed transmitter site.

3. If a final environmental impact statement is issued with respect to Uhuru, KSKG and Arrowhead in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

4. To determine: (a) whether a share-time arrangement among the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational operations and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That, in accordance with paragraph 4 hereinabove, Uhuru, KSKG and Arrowhead shall each submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG
DISTANCE CORPORATION,
Complainant,

v. File No. E-89-422

THE MOUNTAIN STATES
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: May 28, 1992; Released: June 8, 1992

By the Deputy Chief, Enforcement Division:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Access Long Distance Corporation (Access) may be entitled to recover damages as a result of defendant's[1] alleged violation of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Access presents against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainant and defendant have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Access's damage claim rests primarily on the contention that the proper measure

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaint, however, was filed prior to the consolidation. Accordingly, we shall refer to the defendant carrier as it was named in the complaint.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does Access in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

of the damage it has incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendant for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendant raises a number of challenges to complainant's damage claim, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T liability Orders*. Defendant argues that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendant contends that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to complainant when its overall interstate rate of return was below the authorized level.[10] Defendant also contends that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Access may have suffered actual damage as a consequence of defendant's alleged violation of the Commission's rate of return prescription. We tend to agree with Access, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violation could be the difference between the rates it actually paid for defendant's interstate access services and the rates it would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories defendant may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of its access service offerings to establish or support its claim that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendant's excessive earning levels. Moreover, defendant's factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by defendant that would tend to show that Access's share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Access's purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute Access' claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendant's access services during the relevant monitoring period and the amount complainant would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendant.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, complainant may direct to defendant a written request for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendant may perform the calculation and provide this information to complainant within the thirty-day period.

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[8] Access also seeks interest on this amount. We note that the defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Additionally, the defendant contends that the relevant overall interstate rate of return is that of its parent holding company, U S West. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

9. IT IS FURTHER ORDERED THAT complainant and defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY, and GTE NORTH, INC.,
Defendants.

File No. E-89-424
File No. E-89-425

ORDER

Adopted: May 28, 1992; Released: June 8, 1992

By the Deputy Chief, Enforcement Division:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Teledial America, Inc. (Teledial) may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Teledial presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Teledial's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] The complainants relied, as does Teledial in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their overall interstate rate of return was below the authorized level. Defendants also contend that an award of damages based on, the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Teledial may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Teledial, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Teledial's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Teledial's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Teledial's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, complainant may direct to defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT complainant and defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be

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[7] Teledial also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Teledial's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-426
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-427
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434

Defendants.

ORDER

Adopted: May 28, 1992; Released: June 8, 1992

By the Deputy Chief, Enforcement Division:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telesphere Network, Inc. (Telesphere) may be entitled to recover damages as a result of the defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Telesphere presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned case.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does Telesphere in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telesphere's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] Defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their overall interstate rate of return was below the authorized level.[11] Some defendants contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telesphere may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Telesphere, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Telesphere's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telesphere's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Telesphere's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

7. We note that Telesphere filed a motion for leave to serve interrogatories on May 24, 1990, four months beyond the deadline for filing interrogatories under the Commission's Rule.[13] That motion was opposed by some defendants on the grounds, *inter alia*, that good cause was not shown for the four-month delay. We agree with defendants that the interrogatories were untimely and will dismiss complainant's motion on that ground. Both complainant and defendants will have the opportunity to address the issue of damages as provided for herein.

Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Telesphere also seeks interest on this amount. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to Telesphere's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, the U S West and Ameritech companies contend that the relevant overall interstate rate of return is that of the holding company (i.e. U S West and Ameritech) in the aggregate, not each of their component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd 146 and 148 (1990).

[12] *See, e.g.*, The Chesapeake and Potomac Telephone Companies' Motion to Dismiss at 3 (filed November 27, 1989).

[13] *See* 47 C.F.R. § 1.729(a).

IV. CONCLUSION

8. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, complainant may direct to defendants written requests for the information necessary to perform the computation discussed in paragraph 8 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

10. IT IS FURTHER ORDERED THAT complainant and defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

11. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

12. IT IS FURTHER ORDERED THAT complainant's Motion For Leave To File Interrogatories filed May 24, 1990 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

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[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

MICHIGAN BELL, INC.,	File No. E-89-414
WISCONSIN BELL TELEPHONE COMPANY,	File No. E-89-415
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-416
SOUTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-89-417
GTE NORTH, INC.,	File No. E-89-418

Defendants.

ORDER

Adopted: May 28, 1989; Released: June 8, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Charter Network Company, L.P. (Charter) may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Charter presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned case.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Charter's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants'

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[1] Northwestern Bell Telephone Company (NWB), Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. The subject complaint, however, was filed prior to the consolidation. Accordingly, we shall refer to the carrier as it was named in the complaint.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does Charter in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendants, should they choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia,* a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that there is no significant difference between an award of damages based on the measure advocated by the complainant and the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Charter may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Charter in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Charter's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Charter's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Charter's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

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[8] Charter also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to Charter's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce. "*AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, NWB contends that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of U S West's component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[12] *See, e.g.*, Reply of Michigan Bell Inc. at 11 (filed December 21, 1989); Reply of Wisconsin Bell Telephone Company at 6 (filed December 21, 1989).

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY, and SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendants.

File No. E-90-346
File No. E-90-351

ORDER

Adopted: May 28, 1992; Released: June 8, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telecom*USA, Inc. (Telecom) may be entitled to recover damages as a result of alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986, by defendants Southwestern Bell Telephone Company (Southwestern Bell) and Pacific Bell Telephone Company (Pacific Bell).

II. BACKGROUND

2. The case that Telecom presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Telecom's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] The complainants relied, as does Telecom in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd _____, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

prescribed rate of return, plus interest and costs.[7] Allnet has asked the Commission to direct defendants to provide such computations.

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*,[9] and, therefore, unlawful. Defendants, contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level. Southwestern Bell maintains that, under *AT&T v. FCC*, it must be allowed to offset overearnings in individual access categories against underearnings in access categories. Pacific Bell also argues that it should be allowed to offset an award of damages to Telecom by the amount of damages paid by Pacific Bell to other interexchange carriers in proceedings pending before the Commission involving overearnings. Southwestern Bell contends that an award of damages based on the measure advocated by the complainant mirrors the automatic refund rule found unlawful in *AT&T v. FCC*.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Telecom may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Telecom in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Telecom's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Telecom's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Telecom's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests

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[7] Telecom also seeks interest on this amount as well as costs. We note that the defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Telecom's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Southwestern Bell Motion to Dismiss at 4.

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

James Scott Martin
Perry, Oklahoma

NOTICE OF APPARENT LIABILITY

Adopted: April 22, 1992; Released: June 8, 1992

By the Commission:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to James Scott Martin for willful violation of Sections 301 and 325 of the Communications Act, 47 U.S.C. §§ 301 & 325.

2. The appropriate amount of forfeiture for this violation is $1,000.

II. BACKGROUND

3. On June 27, 1991, at 2:25 p.m., U.S. Fish and Wildlife Service Helicopter 7982 Juliet responded to a report of an Emergency Locator Transmitter (ELT) activation relayed from Elmendorf Air Force Base. The tentative location of the ELT was the vicinity of Aichilik River in the Arctic National Wildlife Refuge.

4. At approximately 3:00 p.m. that day the helicopter found Mr. Martin on an airstrip matching the coordinates of a bush airstrip named Aichilik. There was no apparent emergency and Mr. Martin mentioned no imminent danger to the helicopter pilot. He stated that he had activated the ELT because he was late in being picked up by Trans-Porter Air Service. Mr. Martin asked the pilot to contact Trans-Porter. When the Fish and Wildlife Service contacted Trans-Porter, they were preparing to pick Mr. Martin up. Mr. Martin was picked up by Steve Porter of Trans Porter at 4:20 p.m. that same day. Mr. Porter stated, in an interview with the Fish and Wildlife Service on June 28, 1991, that Mr. Martin told him he had not felt that he was in danger; but activated the ELT to expedite his pick up.

5. Mr. Martin had arranged for the plane to meet him at midnight on June 26, 1991. There had been inclement weather that night and into the next morning. By noon there had been clear weather for several hours, sufficient time for a plane to reach him. Mr. Martin believed, so he activated the ELT. He stated that he thought his pilot may have made a scheduling mistake, as had happened before.

6. Mr. Martin had extra food along and stated that he did not activate the ELT out of concern for his life. He stated that he thought he may have to "wait for an undetermined amount of time" and "he was on a schedule to get home."

7. According to the report of the Fish and Wildlife Officer, "Late pickups are common in northern Alaska, with two or three day waits not unusual. The U.S. Fish and Wildlife Service believes a prudent visitor should be prepared to camp one week longer than expected, and that absent threatening circumstances, a wait for that period cannot be considered an emergency."

8. Mr. Martin was not in an area which is considered remote by the Fish and Wildlife Service. He was near an airstrip where fuel is stored and which is visited regularly every two or three days.

9. Mr. Martin is reported to be a chemical engineer and had equipment with him at the time.

10. The facts of this case were reported by the employees of the Fish and Wildlife Service who participated in the events or interviewed Mr. Martin and Mr. Porter immediately thereafter.

III. DISCUSSION

11. Mr. Martin has clearly violated Section 301 of the Communications Act. He has no license for an aircraft station.

12. Mr. Martin has clearly violated Section 325 of the Communications Act. He transmitted a distress signal when no emergency existed.

13. The violation on June 27, 1991, is clearly willful.

14. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount would be $8,000 for each violation. Under the circumstances of this case, however, the Commission believes an amount of $1,000 is appropriate.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that James Scott Martin IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $1,000 for transmitting a false distress signal and operating an unlicensed station in violation of Sections 325 and 301 of the Communications Act, respectively. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

16. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47C.F.R. § 1.80(f)(3), that James Scott Martin shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL response
Room 744
1919 M Street, NW
Washington, D.C. 20554

17. IT IS FURTHER ORDERED that the Chief, Field Operations Bureau shall send, by certified mail, a copy of this Notice of Apparent Liability for Monetary Forfeiture to James Scott Martin, 710 Locust, Perry, Oklahoma 73077.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station KPA404
Mobilecomm of Virginia, Inc.
Churchville, MD

NAL/Acct. No.: 215HF0001

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 8, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Mobilecomm of Virginia, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Mobilecomm of Virginia, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mobilecomm of Virginia, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mobilecomm of Virginia, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0001" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

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FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-115

In the Matter of
Policies and Rules Concerning
Local Exchange Carrier Validation
and Billing Information for Joint
Use Calling Cards

REPORT AND ORDER
AND REQUEST FOR SUPPLEMENTAL COMMENT

Adopted: April 9, 1992; Released: May 8, 1992

Comment Date: June 10, 1992
Reply Comment Date: June 25, 1992

By the Commission:

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I. INTRODUCTION AND BACKGROUND

1. In this Report and Order we review local exchange carrier (LEC) calling card practices. In accordance with this review, we require (1) that all LECs provide non-discriminatory access to LEC joint use card validation data and to LEC screening data; and (2) that any LEC entering into a card honoring agreement with one interexchange carrier (IXC) must stand ready to enter such an agreement with all requesting IXCs. We also amend Part 69 of our Rules to establish a new switched access element for validation database query service. Finally, we invite further comment to assist us in determining whether to establish billing name and address (BNA) service requirements.

2. In 1989 the Common Carrier Bureau initiated a tariff investigation to examine certain practices of Cincinnati Bell Telephone (CBT) relating to the issuance and validation of telephone calling cards. Parties to that investigation maintained that many of the issues examined were not limited to CBT. These parties maintained that, unlike the American Telephone and Telegraph Company (AT&T), certain IXCs were unable to accept calling card calls because they were denied access to LEC validation information necessary to the completion of such calls, resulting in loss of revenue and competitive position.[1] In the *CBT Final Order*, released on May 24, 1991, the Commission con-

[1] IXCs made similar claims in connection with a petition to mandate billing and collection services and access to validation data, or alternatively, petition for rule making, filed by Capital Network Systems, Inc. (CNS) and the Competitive Telecommunications Association (CompTel).

cluded that CBT's maintenance of, and provision of access to, its validation database for joint use calling cards on behalf of AT&T was an integral part of its provision of exchange access and subject to Title II of the Communications Act, 47 U.S.C. § 201 *et seq*. We based these conclusions on the role played by CBT in supplying joint use card account numbers[2] and in maintaining the joint use card database on behalf of AT&T.[3]

3. The record in the *CBT* proceeding provided only limited "information about the specific calling card practices of all LECs, particularly other independent LECs. On May 24, 1991, this Commission issued a Notice of Proposed Rulemaking (*Notice*), seeking information on LEC card practices and proposing requirements for LECs who provide to interexchange carriers (IXCs) access to certain information and services for LEC joint use calling cards.[4] Specifically, we proposed to require that all LECs issuing joint use calling cards provide access to the validation data associated with such cards, regardless of the numbering format, to all IXCs transmitting a call from an enduser seeking to use such a card. We also proposed to require LECs to provide both screening data and billing name and address (BNA) data for LEC joint use cards so as to make available to IXCs the full complement of validation data, and to enable IXCs to bill the cardholder for services provided to the caller.[5]

II. DISCUSSION

A. Non-discriminatory Access to LEC Validation and Screening Data

4. In the *Notice*, we proposed that LECs be required to establish non-discriminatory means of access to "validation data" for their "joint use cards." We also proposed that LECs be required to establish non-discriminatory access to "screening data."[6]

5. We defined "validation data" in the *CBT Final Order* and the *Notice*[7] as (1) the 10-digit telephone line number-based or RAO-based account number for a LEC joint use card, (2) the 4-digit personal identification number or PIN associated with the account,[8] and (3) the updated presence or absence of those numbers in the LECs' databases. The LECs insert card account numbers into their databases or remove the numbers from the databases depending upon the current status of the cardholder's local exchange service. If the LEC retires or reassigns the line "number or if the LEC disconnects a customer's local exchange service for non-payment of local exchange charges, the LEC will remove the card account number from the LEC's data base. The LEC will also remove a card account number if the LEC detects unauthorized or fraudulent use of the account. When a caller uses the card account number to place a local or long distance call, the LEC or IXC queries the validation database about the particular account number. The data base indicates only whether the number as presented by the caller appears in the database. If the number does not appear, the database does not reveal why the number is absent.[9]

6. We defined a "LEC joint use card" in the *Notice* as one which bears an account number assigned by a LEC, is used for services of the LEC and a designated IXC, and is validated by access to data maintained by the LEC.[10] We distinguished such cards from IXC joint use cards which bear account numbers supplied by an IXC, are used for the services of the IXC and a designated LEC, and are validated by access to data maintained by the IXC.[11]

7. "Screening data" are used when a caller seeks to make a collect call (charging the call to the called line) or a third party call (charging the call to neither the calling nor the called line but to a third line). For such calls, the service provider must ascertain whether the line identified by the caller can properly be charged for the call. Screening data flag those subscriber lines to which collect and third party calls cannot be billed (*e.g.*, public telephones), and, like card validation data, allow IXCs to detect attempted fraudulent use of such numbers.[12]

8. Based on the factual determinations recounted in the *CBT Final Order* and the *Notice*, we concluded that the LECs' generation and maintenance of validation for LEC joint use cards and screening data for collect and third-party calls is an inevitable by-product of the LECs' common carrier operations. Moreover, we found that access to this information is a necessary pre-requisite for the placement of interstate collect, third-party and LEC card calls. Accordingly, we proposed that such validation and screening data be provided by LECs issuing LEC joint use cards

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[2] The card account numbers are based on either the subscriber's line number or a Revenue Accounting Office (RAO) number. RAO is a non-line numbering system originally created before the AT&T divestiture.

[3] Cincinnati Bell Telephone Company, 4 FCC Rcd 5033 (Com.Car.Bur. 1989); 4 FCC Rcd 5735 (Com.Car.Bur. 1989); 5 FCC Rcd 805 (1990); 6 FCC Rcd 3501 (1991), *petition for recon. pending*, (*CBT Final Order*).

[4] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Notice of Proposed Rulemaking, 6 FCC Rcd 3506 (1991) (*Notice*).

[5] *Notice*, 6 FCC Rcd at 3508, para. 21.

[6] *Notice*, 6 FCC Rcd at 3508.

[7] *See Notice*, 6 FCC Rcd at 3507, para. 10 and n.6; *CBT Final Order*, 6 FCC Rcd at 3501, para. 2 and n.2.

[8] PINs are assigned to cardholders as a security device. While 10-digit line numbers can be obtained from telephone directories, only the authorized user of the card can provide the PIN to a carrier.

[9] *See* US West Comments at 20 n.44.

[10] *Notice*, 6 FCC Rcd at 3506 n.1. We discuss this definition further in Section II.D.1., *infra*.

[11] *Notice*, 6 FCC Rcd at 3506, n.1.

[12] In the *Notice*, we observed that access to screening data had not been an issue in the *CBT* investigation because the parties did not dispute CBT's contention that it was available from other sources, such as US West Service Link. *Notice*, 6 FCC Rcd at 3507 and n.4. Although screening data relate to calls that are not charged to LEC joint use card calls, we discuss nondiscriminatory access to such data in this section of the Order because the jurisdictional basis for our regulation of validation data and screening data is the same. Both types of information are, as a practical matter, necessary to the completion of away-from-home calling charged by an end-user to a LEC customer account to which the IXC carrying the call has no direct access or relation. Moreover, the LECs store and retrieve screening and validation data in the same database. *See* Section II.A.2., *infra*.

pursuant to reasonable, non-discriminatory tariffs.[13] In practice, this would prevent LECs from discriminating among IXCs in the validation process. In particular, it would ensure non-discriminatory LEC responses to validation queries regarding their joint use cards initiated by IXCs when a caller seeks to make an interstate call.

1. Jurisdiction

a. Positions of the Parties

9. Some LECs argue that, contrary to the analysis in the *Notice*, validation service in general, and line information database (LIDB) access in particular, are not subject to Title II of the Communications Act.[14] The opposing parties, including one BOC, argue that access to validation is a Title II service that should or must be tariffed at just and reasonable rates and provided on a non-discriminatory basis.[15]

10. Several LECs contend that access to validation data is not integral or incidental to local exchange access service because it is not necessary for call completion. They claim that there is no technical barrier to call set-up absent the data and that the IXC is free to accept the call without validation if it so chooses. Access to validation data, they argue, merely concerns billing long after the call has been completed.[16]

11. In addition, some LECs contend that validation is more properly characterized as an integral part of competitive billing and collection, instead of monopoly local exchange access. They state that validation is generally provided in the real marketplace as part of such bundled services, comparable to the offerings of commercial credit card providers. Accordingly, they argue that validation is in fact a contractual financial and administrative service as described in the *Billing and Collection Detariffing Order*,[17] and should therefore remain untariffed under the rationale of that decision.[18] They also maintain that cumbersome, inflexible tariffs would put exchange carriers at a competitive disadvantage relative to other validation service providers.[19]

12. Some LECs argue that validation is not "communications" under Section 3(a) of the Communications Act, 47 U.S.C. § 153(a), because it does not employ wire or radio facilities to transmit intelligence designed by the IXC customer. Moreover, they contend that validation is not a "common carrier" service under Section 3(h) of the Act, 47 U.S.C. § 153(h), because LECs do not hold themselves out as offering the service to any and all potential customers, and they do not have bottleneck control over use of a credit card to make interstate calls.[20]

13. Some LECs argue that, at most, the Commission should invoke its ancillary Title I authority to regulate validation.[21] According to these LECs, the Commission could find that open validation would promote a statutory purpose and should be protected through non-tariffed measures.[22] For example, they suggest that the few instances where market forces failed to work could be remedied through the Section 208 complaint process.[23]

14. The LECs are not unanimous in their interpretation of the Act. SWB asserts that validation service does not fall within the definition of billing and collection services as defined by the Commission in the *Billing and Collection Detariffing Order*, and is therefore subject to Title II of the Act. SWB maintains that the most effective method of recovering costs associated with this service is through tariffs filed by LIDB owners. In cases in which SWB is storing data in its LIDB on behalf of other LECs, SWB believes its own validation service tariffs should apply. It argues that the Commission should not require data owners to file tariffs.[24]

15. IXCs reply that validation is indeed integral to Title II local exchange access because account number supply and validation database maintenance are a product of local exchange service. In addition, they reason that validation is incidental to Title II communications because it is effectively necessary for call completion. They contend that, as recognized in the *CBT Final Order*, the threat of fraud or other uncollectibles practically forces them to obtain validation from the card issuing LEC at the time they must decide whether to accept the call.[25] MCI argues that validation is a necessary part of call set-up for 0+ calls, in that it identifies the originating enduser who will be financially responsible for the call, just as automatic number identification (ANI) identifies this party for 1+ calls.[26] Some parties note that any number of unbundled, optional service functionalities, such as those tariffed on an unbundled basis pursuant to our Open Network Architecture orders,[27] are not technically necessary for call completion,

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[13] *Notice*, 6 FCC Rcd at 3507-08, paras. 11, 21; *CBT Final Order*, 6 FCC Rcd at 3504, paras. 20-23.

[14] *See, e.g.*, Ameritech Comments at 4-5; NECA Comments at 4-7; NTCA Comments 12-14; NTCA Reply at 2-5; OPASTCO Comments at 6-8; Rochester Comments at 8-10; Rochester Reply at 3-9; SNET Comments at 7; US West Comments at 1923. *Accord* BellSouth Reply 3-5; GTOC Reply at 3-4.

[15] *See e.g.*, APCC Comments at 3-4; Comptel Comments at 40-42; CompTel Reply at 14-16; MCI Comments at 6-9; MCI Reply at 6-8; Nycom Comments at 10-12, 30-33; SWB Comments at 14-16; Sprint Comments at 7-8. *Accord* Integretel Reply at 5-7; Intellicall Reply at 9-11.

[16] Ameritech Comments at 4-6; Ameritech Reply at 2-3; Rochester Comments at 6-7; US West Comments at 19-20. *Accord* BellSouth Reply at 4.

[17] Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (*Billing and Collection Detariffing Order*), *recon. denied*, 1 FCC Rcd 445 (1986) (*Detariffing Reconsideration Order*).

[18] *See, e.g.*, Bell Atlantic Comments at 11-12; NYNEX Comments at 9-14.

[19] *See, e.g.*, Ameritech Comments at 9; Rochester Comments at 10-11.

[20] *See e.g.*, GTOC Comments at 6-8; NECA Comments at 5-6; NYNEX Comments at 9-14; US West Comments at 21-22.

[21] Bell Atlantic Comments at 12; BellSouth Comments at 6; GTOC Comments at 8-10; Rochester Comments at 10.

[22] *Compare Billing and Collection Detariffing Order*, 102 FCC 2d 1170-71.

[23] GTOC Comments at 9.

[24] SWB Comments at 14-16. *Accord* CNS Reply at 11-12.

[25] CNS Reply at 10-13; CompTel Reply at 14-18; Integretel Reply at 5-7; Intellicall Reply at 8-11; Nycom Reply at 7-10; MCI Reply at 6-9.

[26] MCI Reply at 7.

[27] Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Order*) *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), *further order*, 5 FCC Rcd 3103 (1990) (*BOC ONA Amendment Order*); *further order*, 6 FCC Rcd 7646 (1991) (*BOC ONA Further Amendments Order*).

but are nonetheless tariffed under Title II.[28] Finally, IXCs argue that validation is not meaningfully competitive because the LECs are the only source of timely, accurate validation information, and that some LECs in fact continue to discriminate against IXCs in their disclosure of validation data.[29]

16. Like SWB, the IXCs claim that validation should not be considered part of billing and collection for purposes of regulation. They note that validation is not included in the explicit enumeration of billing and collection functions in the *Billing and Collection Detariffing Order*. Nycom argues that one important factor which distinguishes validation from all these specific billing activities is that the latter require a completed call, whereas validation queries do not.[30] In terms of the statutory definitions applied in that Order, some IXCs argue that validation itself is "communications," as defined by Section 3(a) of the Communications Act, 47 U.S.C. § 3(a), because validation employs wire facilities to transmit the card number of the end-user and the validation query of the IXC through the network.[31] Other IXCs do not claim that validation itself is communications, but that it is a precondition to call completion, and therefore is incidental or integral to the call itself, which is communications. Similarly, some IXCs argue that validation is a "common carrier" offering within the statutory definition of Section 3(h) of the Act, 47 U.S.C. § 153(h), as applied in the *Billing and Collection Detariffing Order*, because LECs have an effective monopoly over timely, reliable validation.[32]

17. Finally, IXCs argue that complaints under Title I and Section 208 would impose an administrative burden on the Commission, and that tariffs are the only efficient way to secure reliable, non-discriminatory validation service.[33]

b. Discussion

18. Title I of the Communications Act confers upon the Commission jurisdiction over interstate or foreign communications.[34] Title II grants the Commission specific regulatory authority over common carriers engaged in the provision of interstate or foreign communication services.[35] "Communications service" and "common carrier" are defined in Title I. In order to determine whether the LECs' provision of access to validation data is subject to our jurisdiction and to the requirements of Title II, we must determine whether such validation service falls within these definitions.[36] Thus, we must answer two questions. First, is the activity an interstate or foreign communications service? And second, is the person or entity providing the service offering it as a common carrier?[37] For the reasons discussed below, we conclude that, for the LECs' validation and screening services, the answer to both questions is yes.

19. As to the first question -- whether the LECs' validation and screening services are communications services -- we have concluded that the services are "incidental" to the LECs' provision of local exchange access service and therefore are communication by wire within the meaning of Section 3(a) of the Act. The validation and screening databases are simply repositories of information that the LECs necessarily obtain in the course of doing business as local exchange service providers. As the local exchange service providers, the LECs assign line numbers or RAO numbers from the North American Numbering Plan to subscribers and ascertain the nature of the subscriber's service (*e.g.*, whether the line terminates in a public payphone). The LECs' validation databases are simply a listing of these numbers with the PIN and screening data associated with each number. By relying on these data, line number based and RAO number based calling card accounts are in effect simply a means of charging calls to the subscriber's local service account. Moreover, the account number and screening information is included for display in the LECs' databases depending upon the status of the subscriber's local service. If the subscriber fails to pay for or changes local service or if the LEC reassigns the subscriber's line number, the LEC will remove from the database or modify in the database the subscriber's validation and screening data. Conversely, if the subscriber fails to pay the charges for calling card services, the LEC will treat the nonpayment as a failure to pay for local exchange service. Under these circumstances, the validation and screening data in the LECs' databases is not severable from the underlying local exchange transmission service.

20. We reject the contention of some LECs that validation and screening services are not communication services because they do not employ wire or radio facilities to transmit intelligence designed by the IXC customer. As noted above, services such as validation and screening that are "incidental" to the transmission of wire communication service fall within the meaning of communication service as defined in Section 3(a) of the Act.

21. We also reject the LECs' argument that access to validation data must be technologically necessary to call completion in order to be incidental to the provision of local exchange access service. A particular service may be properly considered "incidental" to transmission within the meaning of Section 3(a), even if it is not strictly "necessary" to complete a call; and the LECs offer no authority to the contrary. The language of Section 3(a) is quite broad: "wire communications" includes, *inter alia, all*

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[28] Intellicall Reply at 10.

[29] CompTel Reply at 16-17; MCI Reply at 7; Nycom Reply at 7-10.

[30] Nycom Comments at 32.

[31] *See, e.g.*, Nycom Comments at 32-33; CNS Reply at 12.

[32] *See, e.g.*, CompTel Reply at 14-18.

[33] *See, e.g.*, CNS Reply at 13.

[34] 47 U.S.C. § 152(a). Section 3(a) of the Act defines communications (by wire or radio) as:

> the transmission of writing, signs, signals, pictures, and sounds of all kinds..., including *all instrumentalities*, facilities, apparatus, and *services . . . incidental to such transmission*.

47 U.S.C. § 153(h) (emphasis added).

[35] Section 3(h) defines a common carrier as:

> any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio....

47 U.S.C. § 153(h).

[36] Graphnet Systems, 73 FCC 2d 283, 287 (1979).

[37] *Billing and Collection Detariffing Order*, 102 F.C.C. 2d at 1168.

services incidental to transmission. In view of this broad language, we think it is reasonable to find that access to validation data is incidental to transmission, for the reasons discussed above.

22. The LECs' argument also ignores the practical realities of IXC handling of 0+ interstate traffic. While these commenters may be correct that there is no technical barrier to completing the call absent the data, as a practical matter, IXCs are understandably reluctant to complete calls when they are unable to access validation or screening data and verify that the end user attempting to place the call is either an authorized user of a valid card or is seeking to charge the call to an unrestricted number. As the IXCs note, anything less than full access to LEC validation and screening data, will, as a practical matter, discourage the placement and completion of 0+ interstate calls,[38] thus frustrating the central purpose of the Communications Act, *i.e.*, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service ...." 47 U.S.C. sec. 151.

23. We thus conclude that, as services "incidental" to the LECs' local exchange access service, validation and screening services are "wire communication" under Section 3(a) of the Act and thus are properly considered a communications service.

24. We also conclude that the LECs' validation and screening services must properly be described as common carrier services within the meaning of Section 3(h) of the Act. As both the courts and the Commission have often noted, the statutory definition of a common carrier is not helpful because of its circularity ("Common carrier... means any person engaged as a common carrier")[39] and we therefore must rely on judicial interpretations of the section[40] and applications by the Commission. Under the test enunciated in *NARUC I*,[41] an entity is a common carrier with respect to a particular service if it is under a legal compulsion to "hold [itself] out indiscriminately to the clientele [it] is suited to serve," or if it in fact does so even without any legal compulsion.[42]

25. The LECs' validation and screening services qualify under the *NARUC I* test. In applying the first prong of the test, we have in the past considered whether the service provider faces competition in the provision of the service.[43] If a service provider does or will possess market power because of a shortage "of alternative suppliers or capacity[44] or because customers lack the ability or interest to represent themselves adequately in dealings with the service provider, we will require the provider of a communications service to hold itself out indiscriminately to the public on a common carrier basis.[45] As we have already found, access to validation and screening services is necessary as a practical matter to enable interexchange carriers to provide many interstate services, primarily operator services. As we observe in paragraph 20 above, the LECs' validation and screening databases are a byproduct of their local exchange service. Most local exchange services are still provided as monopoly services. Significantly, the record in this docket reveals that only the LECs can provide validation and screening data in its original, accurate, and up-to-date form. Therefore, we conclude that the LECs should be legally obligated to hold themselves out indiscriminately as common carrier providers of these services, and we require them to do so. Regulation of these services under our Title I ancillary jurisdiction, as suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and nondiscriminatory terms and conditions.

26. The LECs have argued that validation and associated functions are not Title II services as defined by the Act, but rather are billing and collection services of the kind detariffed under the *Billing and Collection Detariffing Order*.[46] We cannot agree. Validation is not included in the explicit description of billing and collection in the *Billing and Collection Detariffing Order:*

> the recording and aggregation of the billing data corresponding to a completed telephone call, the application of the IC's rates to these calls in order to create a customer invoice, the mailing of bills, the collection of customer deposits and bill payments, the handling of customer inquiries concerning them, the investigation of customer inquiries concerning their bill, and the investigation of customer fraud or billing evasion activities.[47]

We did not address validation and associated functions in our 1986 consideration of the LECs' provision of billing and collection services to unaffiliated IXCs.[48] As noted in above in paragraph 22, only LECs can provide validation and screening data in its original, accurate, and up-to-date form. Since the LECs alone have a virtual monopoly in the first instance over this essential information, the provision of validation services is not subject to the competitive pressures we found existed in the billing and collection market.[49] For these reasons,[50] we conclude that a different

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[38] *See CBT Final Order*, 6 FCC Rcd at 3503-04.

[39] 47 U.S.C. § 153(h).*See* Graphnet Systems, Inc., 73 F.C.C. 2d at 289.

[40] NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 999 (*NARUC I*).

[41] *Id.*

[42] *Id.* at 641, 642; *See also* Norlight Request for Declaratory Ruling, 2 FCC Rcd 132, *recon. denied*, 2 FCC Rcd 5167 (1987).

[43] *Billing and Collection Detariffing Order*, 102 FCC 2d at 1153, *citing* Detariffing of Billing and Collection Services, CC Docket No. 85-88, Notice of Proposed Rulemaking, 100 FCC 2d 607 (1985).

[44] Lightnet, 58 Rad. Reg. 2d 182, 184 (1985).

[45] Norlight, 2 FCC Rcd at 134.

[46] *See* note 15, *supra*

[47] *Billing and Collection Detariffing Order*, 102 FCC 2d at 1168. In *Public Service Commission of Maryland*, 4 FCC Rcd at 4005, we also found a procedure known as disconnection for nonpayment (DNP) and call detail recording to be LEC billing and collection services because, from a technical perspective, they are two integral components of the billing and collection services the LEC provides to IXCs. This is not true of validation and screening services.

[48] *See Billing and Collection Detariffing Order*, 102 FCC 2d at 1168. Nor did we examine these functions in our 1989 consideration of billing and collection services in *Public Service Commission of Maryland*, 4 FCC Rcd at 4000, 4004.

[49] *See Billing and Collection Detariffing Order*, 102 FCC 2d at 1170. In contrast, as discussed above, the record in this proceeding indicates that no such competition exists with respect to the LECs' validation services. Thus, our exercise of Title II jurisdiction here is appropriate.

regulatory approach from that warranted for billing and collection is necessary and appropriate for validation and screening services.

2. Effect of LIDB

27. The line identification database (LIDB) is a series of interconnected databases created by the LECs to enable them to share with each other and with IXCs validation and screening data on a per call basis. The LECs store the data in LIDB and update it on a regular basis. LIDB was developed precisely for validation obligations of the kind we have discussed herein. In the *Notice*, we requested specific comment on the status of LIDB deployment and its effectiveness to meet our concerns regarding access to validation and screening data. We also requested comment on the technological implications of our proposal, particularly with respect to the need for LIDB users to have Common Channel Signalling (CCS) capabilities in order to interconnect with LIDB.[51]

28. As discussed in Section II. E., *infra*, since the *Notice* was released on May 24, 1991, the Common Carrier Bureau has preliminarily addressed the LECs' rates and rate structures for LIDB in the context of petitions for waiver and tariff filings establishing new rate elements for transmission services connecting customers to the LECs' CCS networks and for access to the LIDB database itself. On October 4, 1991, the Bureau granted the petition for waiver of Part 69 of our Rules filed by SWB to permit SWB to establish switched access rate elements for CCS interconnection and LIDB query service. On December 30, 1991, the Bureau granted the waiver requests of other LECs and their LIDB tariffs became effective subject to accounting orders and investigation.[52]

a. Positions of the Parties

29. All large independent LECs stress the positive role of LIDB in the open validation environment, whether through their own system or that of a third-party provider, and they report systems which are already technologically operational or soon will be.[53] Small independents state that they will take LIDB through third-party providers, primarily ITN and US Intelco,[54] and that such arrangements will enable them to offer a range of billing and validation services and options which will be roughly equivalent to those planned by larger LECs. The small LECs further maintain that their LIDB systems under third party contracts will render moot the main validation issues in the *Notice*.[55] Finally, the BOCs state that they now have interconnected, technologically complete LIDB systems.[56]

b. Discussion

30. The comments here and in the related proceedings we have referenced confirm our belief that, apart from questions of rate level to be resolved in the tariff investigation, and the question of the rate structure for CCS interconnection, which will be resolved in a separate rulemaking proceeding,[57] tariffed LIDB service will be an adequate vehicle to enable both large and small LECs to discharge their Title II obligations. The larger LECs own and operate the LIDB systems and the smaller LECs may participate in the system by loading their data into the LIDB system maintained by the BOCs or third-party LIDB providers. The purpose of LIDB is to provide the nondiscriminatory validation and screening service on which we sought comment in the *Notice*. Although the rates and terms of these offerings are contingent on the outcome of the tariff investigation, we are satisfied that any adverse findings can be remedied through that procedural vehicle.

3. Bulk Data Provision v. Call-by-Call

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[50] Several LECs argue that validation service, similar to billing and collection services, is an administrative and financial service, not a communications service, and therefore should be offered on a non-tariffed basis under the rationale of the *Billing and Collection Detariffing Order*. We recognize that in the *Billing and Collection Detariffing Order*, the Commission found that LEC billing and collection for an unaffiliated IXC is "not a communication service for purposes of Title II of the Communications Act," but rather, "is a financial and administrative service." 102 FCC 2d at 1168. Nevertheless, in recognizing its Title I ancillary jurisdiction over billing and collection services, the Commission found that such services were "incidental" to the transmission of wire communications and thus fell within the meaning of "wire communication" as defined in Section 3(a) of the Act. *Billing and Collection Detariffing Order*, 102 FCC 2d at 1169; *see also Public Service Commission of Maryland*, 4 FCC Rcd 4000, 4004 (1989), *aff'd on other grounds sub nom., Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990). These two findings appear inconsistent. Upon further analysis, we believe the latter conclusion, that billing and collection is incidental to the transmission of wire communication and thus is properly considered a communications service under Section 3(a) of the Act, is the correct one. Billing and collection, of course, remains outside the scope of Title II because it is not a common carrier service. *See Billing and Collection Detariffing Order*, 102 FCC 2d at 1169; *Public Service Commission of Maryland*, 4 FCC Rcd at 4000, 4004.

[51] *Notice*, 4 FCC Rcd at 3509, paras. 28-29. In this part of the *Notice*, we also requested comment on the effectiveness of LIDB to solve the problem of discriminatory LEC validation practices, "as that database is reputed to have the capability to override the presubscribed line's carrier with the credit card owner's preference." *Notice*, 4 FCC Rcd at 3509 (para. 28). Several parties interpreted this as raising the issue of billed party preference (BPP), in which a card holder is able to obtain the services of the interexchange carrier presubscribed to the charged account for 0+ interLATA calls. Our purpose in paragraph 28 was to obtain comment regarding the effectiveness of LIDB service to meet Title II obligations regarding validation. Accordingly, we will not address their BPP comments in this docket, but rather will address them in the companion rule making we begin in CC Docket No. 92-77.

[52] Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, 6 FCC Rcd 6095 (Com.Car.Bur. 1991) (*SWB Waiver Order*); Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com.Car.Bur. 1991).

[53] Centel Comments at 3-4; GTOC Comments at 3-4; PRTC Comments at 2; Rochester Comments at 5-6; SNET Comments at 4; United Comments at 4.

[54] *See, e.g.*, NECA Comments at 5-7.

[55] *See, e.g.*, USTA Comments at 10.

[56] Ameritech Comments at 10-12; Bell Atlantic Comments at 6-7; NYNEX Comments at 6-8; Pactel Comments at 3-5; SWB Comments 7-8; US West Comments at 11-12.

[57] MTS and WATS Market Structure, Transport Rate Structure and Pricing, CC Docket Nos. 78-72, 91-213, Phase I, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991) (*Transport Order*).

31. In the *Notice*, we invited comment on whether validation access should be provided on a call-by-call, bulk transfer, or some other basis.[58] In addition, we requested comment on whether one or another of these forms of access would be consistent with our policies concerning customer proprietary network information (CPNI).[59] Bulk transfer of validation data from a LEC allows the transferee to establish a duplicate database, which can then be used for call-by-call validation either by itself or with similar duplicates of other LEC databases. LIDB is the primary existing example of real-time, per query access, whereas dispatches of LEC data to US West Service Link or ITN typify existing bulk transfers. US West Service Link was established by the BOCs to comply with an Order of the MFJ Court that they make validation data available to IXCs other than AT&T; it is now anticipated by the BOCs, however, that Service Link will be discontinued once LIDB is fully implemented.[60] ITN is a third-party LIDB supplier who periodically receives bulk transfers from generally smaller LECs who do not choose to establish their own individual LIDBs.

a. Positions of the Parties

32. Some BOCs and IXCs argue that exclusive call-by-call access through LIDB is preferable to bulk data transfers because: it would facilitate prevention of fraud; it would be more economically attractive to small OSPs and IXCs with low volume validation queries; it would make available the most current data; and it would be less administratively burdensome to update than bulk.[61] In addition, Intellicall argues that call-by-call validation will be consistent with the Commission's CPNI rules.[62] In contrast, AT&T and Intellicall support bulk transfer in addition to call-by-call because carriers seeking validation should have the flexibility afforded by different forms of access, many LECs have successfully offered bulk data already, and small IXCs would benefit from the lower per volume charges.[63]

b. Discussion

33. We decline to require bulk data transfers at this time. The argument that bulk validation data would lend itself to fraud or dissemination of confidential information is plausible, but the absence of any record evidence of substantial abuse in current bulk transfer practices indicates that this risk may be chimeric. The claim that it would be burdensome for LECs to keep bulk data up-to-date is also plausible, but again there is no record evidence of such problems in existing bulk transfer practices. Finally, there may be merit to the contention that bulk provision would be economically advantageous for smaller IXCs with low volume needs for validation service because third-party validation suppliers and clearing houses could aggregate the demand of small IXCs to obtain volume pricing advantages. On the other hand, the LECs' deployment of LIDB at per query rates also offers low volume users an economic means of access. Because the record does not suggest that a market place problem exists at this time which requires that we mandate that all LECs offer bulk transfers we will not impose a regulatory solution in this Order.

B. Non-discriminatory Entry Into Card Honoring Agreements

34. Some IXCs choose to issue their own calling cards and maintain the account information for those cards in their own validation databases. Such cards can be used for both the IXC's services and a LEC's services only if the LEC and IXC enter into a card honoring agreement whereby the LEC agrees to access the IXC's database to validate the card when an end user presents the card to obtain the LEC's services, and the IXC agrees to permit such access. In the *Notice*, we tentatively concluded that a LEC entering into such a card honoring agreement must do so on a nondiscriminatory basis.[64] We believed that, in the absence of a non-discrimination requirement, a preferred IXC's calling card would have an undue competitive advantage over the cards of the excluded IXCs.

1. Positions of the Parties[65]

35. Most commenters agree that card honoring agreements should be provided on a non-discriminatory basis.[66] Many of the LECs state that such agreements are already in place.[67] NTCA, however, contends that the Commission should not establish any requirement mandating that the LECs enter into agreements with all IXCs.[68] NTCA asserts

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[58] *Notice*, 6 FCC Rcd at 3509, para. 30. We also requested comments in this paragraph of the *Notice* on whether screening data should be provided on a quarterly, monthly or weekly basis. No party specifically addressed this question.

[59] *Id.* CPNI includes virtually all information about a customer's network services and use of those services that a LEC possesses by virtue of its provision of network services. *See* Filing and Review of Open Network Architecture Plans, 6 FCC Rcd 1 (1988) (*BOC ONA Plans Order)* at 215 (para. 411); Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order).*

[60] *See, e.g.*, NYNEX Comments at 7; Rochester Comments at 5-6; CPA Reply at 4-5.

[61] GTOC Comments at 12-13; SWB Comments at 13; USTA Comments at 10 n. 15; US West Comments at 14-15; ITN Comments at 2.

[62] Intellicall Comments at 8. A few parties also commented on whether there are CPNI concerns about validation in general. *See, e.g.*, Sprint Comments at 6-7.

[63] Intellicall Comments at 8; AT&T Reply at 15-16. BellSouth states that it will continue to make bulk data available on a contract basis. BellSouth Comments at 10, n.16

[64] *Notice*, 6 FCC Rcd at 3509, para. 22.

[65] A number of commercial credit card providers (*e.g.*, Mastercard, Visa) filed comments in which they argue that we should require the LECs to enter into database access agreements not only with IXCs but with commercial credit card providers as well. The *Notice* proposed to require non-discriminatory arrangements with IXCs in order to protect competition in the interexchange marketplace. The *Notice* did not seek comment on database access arrangements with commercial credit card providers. The commercial credit card providers raise an issue that is beyond the scope of this rulemaking and we do not address the issue in this Order.

[66] *See, e.g.*, Ameritech Comments at 1-4; GTOC Comments at 4; NYNEX Comments at 3-8, 16; USTA Comments at 8; US West Comments at 5.

[67] *See, e.g.*, Ameritech Comments at 1-4; GTOC Comments at 4; NYNEX Comments at 3-8, 16; PRTC Comments at 2; US West Comments at 5.

[68] NTCA Comments at 11.

that requiring LECs to honor every IXC's request to the LECs to access its validation database is beyond the scope of this proceeding, that the number of possible IXC partners is administratively infeasible, and that the LEC would be forced to rely on unknown, potentially unreliable partners.[69]

2. Discussion

36. We adopt our proposal that a LEC which agrees to enter into an agreement with one IXC to accept its calling card for LEC services and query that IXC's database to validate the card, must do so on a non-discriminatory basis for all other IXCs, if they so request. If a LEC is permitted to accept only one IXC's card for a LEC's services, the LEC would thereby confer a competitive advantage on the preferred IXC, which in turn could distort the development of healthy competition, based on the merits of competing providers, in the interexchange market.[70] Such a practice of discriminatory entry into card honoring agreements would constitute an unreasonable practice under Section 201 of the Communications Act.

37. In response to NTCA's comments, we emphasize that the LEC can choose not to have these agreements with any IXCs. Our rule simply mandates that if a LEC and an IXC enter into such an agreement, the LEC must be willing to do the same for other IXCs. And, of course, the terms of those agreements may reasonably vary depending upon the requirements of the LEC and the particular IXC. For this reason, NTCA's objection that a small LEC will be burdened with a multitude of new, sometimes unreliable partners lacks merit: the LEC can elect to have no such agreements or to protect itself through reasonable terms and conditions in its database access agreements.

C. BNA Associated with LEC Card Accounts

38. In addition to validation data, we proposed that LECs be required to provide "stand alone" BNA data for LEC joint use cards so as to enable IXCs to bill the cardholder for the services provided. Although an IXC may be the presubscribed carrier for the line on which the call originates, it may have no independent relationship with the end user who seeks to bill the call to a LEC calling card. If the IXC does not have a billing and collection agreement with the LEC or other third party provider of billing and collection services, the IXC must seek payment for its services directly from the cardholder. Thus, BNA for the cardholder is necessary if the IXC must bill the cardholder directly. Therefore, BNA is essential to make validation service of any practical value to those IXCs who do not have billing and collection agreements with the LECs. We observed in the *Notice* that, like validation data, BNA is generated by LECs in the provision of local exchange service and appeared to be uniquely in the possession of the LEC. Therefore, we tentatively concluded that access to BNA, like access to calling card validation data, is a Title II service. We also stated, however, that our proposal to require access to BNA associated with LEC card accounts raised questions of consistency with the policies underlying our CPNI requirements.[71]

39. Because of the sensitive nature of BNA, and the variety of possible ways in which access to this data could be provided, we requested that commenting parties address the following issues: (1) whether LECs should be required to disclose the BNA data for their joint use cards to any IXC handling a call billed to such a card; (2) if so, the means by which such a disclosure should be accomplished; and (3) whether such disclosure is consistent with our general policies concerning CPNI and the limits, if any, on the disclosure procedures given those general policies. With respect to the second issue, we requested comment on the technological feasibility and cost of providing BNA with validation responses by means of LIDB, as a timely and effective means of access.[72] We also requested comment on the appropriate rate structure or other tariff requirements to be imposed on the LECs' provision of access to BNA information.[73]

1. Non-discriminatory Access to BNA

a. Positions of the Parties

40. Several BOCs object strongly to the proposed rule requiring provision of standalone BNA.[74] Bell Atlantic argues that if such a rule is imposed, it should be limited to those LECs which do not offer billing and collection services to all IXCs.[75] Most BOCs and large independent LECs state that they already offer BNA to all requesting IXCs and OSPs as a part of their billing and collection service offerings. For example, Bell Atlantic offers BNA for limited purposes, and its data is tailored to meet the requesting IXC's specifications.[76] BellSouth provides BNA to requesting IXCs on a contractual basis in several formats.[77] NYNEX states that it offers BNA to IXCs solely for billing purposes, and does so on a number-by-number basis.[78] Ameritech states, without elaboration, that it makes BNA available to IXCs.[79] SWB offers what it describes as "standalone BNA service" through its existing billing and collection services by contract and/or pursuant to state tariffs.[80] Pactel and US West also offer standalone BNA under intrastate tariff.[81] Ameritech, SWB and US West maintain that there has been almost no expression of interest in their BNA service.[82]

41. The independent LECs also vary considerably in the provision of BNA. Significantly, GTOC's interstate access tariff offers BNA service to any subscriber to Feature Group D services. A number of third party firms, according to GTOC, provide a billing and collection function for

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[69] NTCA Comments at 16-17.

[70] *See* Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, FCC 92-181, released April 17, 1992.

[71] *Notice*, 6 FCC Rcd at 3508-09, paras. 21, 30.

[72] *Id.* at 3509-10, paras. 28, 30-31.

[73] *Notice*, 6 FCC Rcd at 3510, para. 32.

[74] Bell South Comments at 5-9; Bell Atlantic Comments at 7-10.

[75] Bell Atlantic Comments at 10.

[76] Bell Atlantic Comments at 7 n.13.

[77] BellSouth Comments at 5-7.

[78] NYNEX Comments at 14-15.

[79] Ameritech Comments at 13.

[80] SWB Comments at 9.

[81] Pactel Comments at 5; US West Comments at 12.

[82] Ameritech Comments at 13-14; SWB Comments at 9.

IXCs that are not located within a GTE territory and IXCs that serve casual users of LEC calling cards.[83] Several LECs state that BNA is available from a number of sources, such as billing and collection clearinghouses, to any entity desiring to perform its own billing or to have a third-party perform billing.[84] SNET does not offer BNA to IXCs as a general service offering; it will provide incidental billing services on a contractual basis for IXCs who have carried a call charged to a SNET calling card.[85] CBT offers BNA with respect to LEC subscribers through Customer Account Record Exchange (CARE) procedures, which are available to non-LEC third parties performing toll billing and collection. According to CBT, this makes it possible for an IXC to match a recorded originating telephone number with the name and address of the end user who is to be billed.[86] CBT does not state whether its BNA data is specifically linked to the calling card number. In contrast, Rochester states that it does not offer or furnish BNA for its calling cards to any IXC on a wholesale basis. Rather, Rochester maintains BNA in internal systems it uses to provide billing and collection services on a competitive basis. Under its billing and collection agreements, Rochester will only disclose BNA to an IXC if the card holder has refused to pay the IXC's charges and Rochester's collection efforts have been unsuccessful.[87]

42. All of the parties arguing against the mandatory provision of standalone BNA claim that such a requirement will have the undesirable result that their customers will receive multiple bills from virtually unknown carriers. They assert that this would cause customer inconvenience and frustration because customers expect all their calls to be billed by the card issuer, similar to the practice under commercial credit cards.[88] A number of the LEC trade associations have objected to mandatory BNA disclosure.[89] One claims that opening up billing for LEC card usage to OSPs, for example, is contrary to subscriber interests in having the credit and billing relationship exclusively with the LEC for call transactions billed to the LEC-issued card.[90] Another maintains that the Commission has declined to tariff BNA in the past and that there is no reason to do so now.[91] In addition, several LECs argue that the mandatory disclosure of BNA to IXCs for the purpose of permitting them to perform their own billing of calls charged to a LEC card would handicap the LECs competitively, because unregulated billing and collection providers could use the LEC's tariffed BNA to compete against the LECs in the market for comprehensive billing and collection services.[92]

43. Some opponents of mandatory BNA provision claim that BNA is not a Title II service. BellSouth, for example, argues that tariffing BNA would be wholly inconsistent with previous decisions to detariff BNA as a billing and collection activity outside the scope of Title II regulation.[93] Others, however, state that BNA could be regulated under Title I of the Act in those few situations in which there was genuine discrimination.[94]

44. Most IXCs support the requirement that the LECs must provide non-discriminatory access to BNA associated with LEC card accounts.[95] They argue that, by enabling OSPs to do their own billing and collection, access to BNA will remedy the LECs' current discriminatory practice of negotiating billing and collection contracts with only some IXCs.[96] Integretel, for example, notes that although the LECs provide a myriad of services in connection with billing, they do so in inconsistent and discriminatory ways. Some provide BNA in conjunction with their own bill rendering service, but not as a separate element; others provide full bill rendering services, including BNA to some carriers (*i.e.*, AT&T) but refuse to provide anything but BNA to other carriers; still other LECs provide both BNA and billing and collection to AT&T but refuse to give either to other IXCs. Integretel argues that this inconsistent treatment of BNA allows the LEC to give one IXC an unfair advantage over its competitors. Integretel argues further that BNA is as essential to the billing process as validation is to the call transmission process. According to Integretel, the LEC is in the best position to provide accurate BNA to carriers or billing agents attempting to bill for completed calls because the LECs obtain such information as a result of their unique status as local exchange carriers. Moreover, Integretel states, accurate BNA is not available from other sources. Integretel asserts that while certain non-telecommunications collection agencies have compiled incomplete lists which match telephone numbers with BNA, these companies produce accurate information only for approximately forty percent of all bills. Integretel argues that BNA is necessary to provide IXCs with the minimal means to collect for their services.[97] MCI also insists that BNA, like validation, should be tariffed as a Title II service to prevent LECs from frustrating an IXC's ability to bill and collect by engaging in discriminatory, negotiated contracts on an individualized basis with other, preferred carriers.[98]

45. Some IXCs also argue that if LEC provision of BNA is required, the service should be offered on non-discriminatory terms. That is, the LECs should either be required to unbundle BNA from de-tariffed billing and collection

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[83] GTOC Comments at 13-14, *citing* GTOC Tariff F.C.C. No. 1, Section 6.9.

[84] *See* NTCA Reply at 3.

[85] SNET Comments at 4-5.

[86] CBT Comments at 5.

[87] Rochester Comments at 12-13.

[88] Ameritech Comments at 7-14; Bell Atlantic Comments at 7-9; GTOC Comments at 14; NTCA Comments at 15-16; OPASTCO COmments at 10; Pactel Comments at 5.

[89] *See, e.g.*, OPASTCO Comments at 8; NTCA Comments at 14-16.

[90] NTCA Comments at 15.

[91] USTA Comments at 9, *citing Billing and Collection Detariffing Order*.

[92] Rochester Comments at 13-14; NTCA Comments at 15-15; OPATSCO Comments at 10-11.

[93] *See, e.g.*, BellSouth Comments at 5-6; NYNEX Comments at 15-16; USTA Comments at 9.

[94] BellSouth Comments at 6. *See also* Bell Atlantic Comments at 9-10.

[95] *See, e.g.*, Americall Comments at 18-25, Americall Reply at 17-18; APCC Comments at 9-10; Comptel Comments at 35-38, Comptel Reply at 13-18; CNS Comments at 4, CNS Reply at 13-14; DNS Comments at 7; Fone Comments at 2-3; Integretel Comments at 9, 14-16, Integretel Reply at 9-10; Telesphere Comments at 30-32; VAC Comments at 2; Nycom Reply at 9.

[96] *See, e.g.*, Integretel Comments at 13-14; Comptel Reply at 14.

[97] Integretel Comments at 12-14, Integretel Reply at 2-4. *Accord* Americall Comments at 18-25.

[98] MCI Reply at 7-9.

agreements and offer stand alone BNA on a tariffed, nondiscriminatory basis pursuant to Title II, or they should be required to offer all available billing options, including BNA, to all IXCs on a non-discriminatory basis.[99] Americall argues that the Commission could achieve this without changing the decision in the *Billing and Collection Detariffing Order*, by exercising our Title I power to require non-discriminatory availability of these service options.[100]

b. Discussion

46. The record before us is insufficient to resolve the issue of whether LECs should be required to disclose the BNA data for their joint use cards to any IXC handling a call billed to such a card. The parties have not provided a comprehensive and focused discussion of this issue. Moreover, several of the pleadings filed thus far contain alternative proposals that merit further discussion by interested parties.[101] Therefore, we will not, at this time, adopt our tentative conclusion that access to the BNA of the card holder is a Title II service, subject to the statutory requirements that it be offered on a tariffed, nondiscriminatory basis, at just and reasonable rates. Instead, we will establish an additional pleading cycle targeted at this issue to give interested parties an opportunity to expand the current record.[102] In addition, we specifically ask parties to comment on the extent to which the unavailability of BNA is a problem for IXCs. We also request comment on how we might best tailor any regulatory requirements relating to BNA to address the practical problems experienced by IXCs.

2. Means of Access to BNA

47. In the *Notice*, we requested comment on how best to make available access to BNA. Because of the sensitive nature of BNA and the variety of possible ways to provide access to this data, we specifically requested comment on the means by which BNA could be disclosed to IXCs.[103] We also requested parties to address the degree to which the LECs' implementation of their LIDB systems would alleviate the problem of access to BNA. We recognized that the LECs established their LIDBs as vehicles only for storing and updating data regarding calling card and subscriber line status. Therefore, we specifically requested comment on the technical feasibility and cost of using LIDB to store and retrieve BNA as well.[104]

a. Positions of the Parties

48. The LECs argue that they should not be required to provide BNA through LIDB. They argue further that LIDB was neither intended nor designed to provide BNA, and that provision of BNA through LIDB would present numerous technical and practical problems.[105] NYNEX, for example, argues that its LIDB is designed to store only validation numbers, not BNA, and that it is not technically feasible to do so at the present time. BNA inclusion in LIDB would require new ANSI Signalling System 7 (SS7) standards, new switch generic requirements, modifications to the LIDB and associated support systems, and could also trigger the need for additional LIDBs. NYNEX states that the cost and time required to undertake such development efforts is unknown. Moreover, NYNEX maintains that IXCs only need BNA data to bill a calling card call, not to validate it on a real-time basis. NYNEX states that the BNA data can be provided through other existing BOC systems without having to redesign the LIDB system.[106] Several LECs state that they already offer BNA to all carriers pursuant to state tariffs and/or contract, and that this demonstrates BNA can be offered without expensive LIDB modifications.[107]

49. United states that before development of a BNA component for LIDB can begin, industry standards must be agreed upon to ensure interoperability between multivendor networks.[108] Several LECs observe that the use of LIDB to provide BNA would add to delay in establishing the call.[109] More importantly, the LECs question the utility of a combined validation/BNA LIDB service. They argue that carriers do not require BNA at the time of call completion, but rather at the time of call billing. The potential delay between the time of the call and the rendering of the bill may be several months, during which time the BNA information may change.[110]

50. The only response to the LEC objections to providing through LIDB is MCI's admission that it has no knowledge of whether the technical problems of including BNA in LIDB are insurmountable.[111]

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[99] Americall Comments at 18-25; Americall Reply at 17-18; APCC Comments at 9-10; CompTel Comments at 35-38; Fone Comments at 3, Integretel Comments at 9, 14-16; CNS Reply at 13 n.39.

[100] Americall Comments at 23-25. *See also* Bell Atlantic Comments at 10.

[101] *See, e.g.*, Bell Atlantic Comments at 10.

[102] In the *Notice*, we denied the CompTel/CNS petition requesting that we require all LECs to provide billing and collection services on a nondiscriminatory basis, at just and reasonable rates under the authority of Title I. 6 FCC Rcd at 3506, 3509, paras. 3, 24. We observed that our proposal to require LECs to provide BNA, if adopted, would enable the petitioners to perform their own billing and collection. We stated that, if we do not adopt our proposal to require BNA disclosure, CompTel and CNS could renew their petition without prejudice. 6 FCC Rcd at 3511, n.13. We emphasize that our action today does not constitute final action on our proposal in the *Notice*. If we determine after review of the record as expanded that we will not adopt our proposal, CompTel and CNS remain free to renew their petition.

[103] *Notice*, 6 FCC Rcd at 3510, para. 31.

[104] *Id.* at 3509, para. 28.

[105] *See, e.g.*, Ameritech Comments at 12-14; BellSouth Comments at 5-7; NYNEX Comments at 14-16; Pactel Comments at 5; SNET Comments at 5-6; SWB Comments at 10-11; US West Comments at 12-13.

[106] NYNEX Comments at 14-15 n. 22. *See also* Ameritech Comments at 12-13; Bell Atlantic Comments 6-7 and Appendix at 1-2; BellSouth Comments at 6-7; CBT Comments at 5; Pactel Comments at 5; SNET Comments at 6-7; SWB Comments at 9-11; US West Comments at 11; Centel Reply at 2-3; NECA Reply at 5-6.

[107] BellSouth Comments at 6; Pactel Comments at 5; SWB Comments at 9-10; US West Comments at 12-13.

[108] United Comments at 4-5.

[109] *See, e.g.*, Ameritech Comments at 13; BellSouth Comments at 7; SWB Comments at 11; US West Comments at 13.

[110] Ameritech Comments at 13-14; BellSouth Comments at 7.

[111] MCI Reply at 7-8.

b. Discussion

51. We requested comment generally on how BNA should be provided to IXCs, as well as comment on the provision of BNA through LIDB. The commenters focused almost exclusively on the issue of the technical feasibility and cost of using LIDB to store and retrieve BNA data. Alternative methods of providing BNA received little elaboration beyond the statements by some commenters that "standalone" BNA is currently being provided by some LECs pursuant to contracts, state tariffs, and in the case of GTOC, interstate access tariffs. Moreover, both the LECs and the IXCs have a variety of network configurations and usage patterns which could support a variety of methods for making BNA available. The record nevertheless is sufficient to conclude that provision of BNA through LIDB at this time is not technologically or economically feasible, and in any event, may not be the best way to make timely, accurate BNA available to IXCs. Should any LEC decide in the future that provision of BNA though LIDB is an economically feasible and efficient manner of disseminating this data, it would, of course, be free to offer BNA through its LIDB.

52. Given the variations in need and technology identified in the pleadings, and in the absence of a more developed record on both this issue and the issue of our jurisdiction over LEC provision of BNA service, we will not at this time prescribe a single method for providing BNA access. In the event we do adopt regulatory requirements for LEC provision of BNA, we seek additional comment on the issue of whether the Commission should prescribe a specific BNA service rate structure.

3. BNA Disclosure Limitations; Privacy Concerns

53. In the *Notice*, we cited the sensitive nature of BNA and requested comments on whether BNA disclosure is consistent with the policies underlying our CPNI requirements. We noted that in various contexts, the Commission has found that CPNI should receive special protection against nonconsensual disclosure, including advance authorization from the customer prior to the release of a customer's CPNI to other companies. We further requested comments concerning the limits, if any, we should impose on BNA disclosure procedures given the policies underlying our CPNI rules.[112]

a. Positions of the Parties

54. Some commenters argue that provision of BNA is consistent with CPNI requirements. They argue that BNA is not CPNI because it concerns only billing information rather than a customer's sensitive network information, such as that revealed by its use of customer proprietary equipment or its pattern of network usage.[113] Integretel believes that BNA is a type of credit information in that it allows the carrier to determine whether the account is valid and creditworthy. Integretel notes that "credit information" is specifically excluded from the scope of CPNI and that the BOCs' ONA plans in fact do not include it.[114] NYNEX maintains that since its BNA can only be used for billing purposes, and not for the purpose of marketing customer premises equipment (CPE), enhanced services, or any other service, NYNEX's provision of BNA to IXCs is consistent with the policies underlying the Commission's CPNI requirements.[115]

55. US West states that it does not treat BNA as CPNI, but it understands that other BOCs do. According to US West, although CPNI policies have developed in the context of sharing customer network information with CPE providers and enhanced service providers (ESPs), there is nothing inherent in the definition of CPNI that would render those policies inapplicable in other contexts. It argues that even if BNA were considered CPNI, there is no Commission rule prohibiting LECs from disclosing it to IXCs, as opposed to CPE providers and ESPs, so that the current rules permit delivery of BNA to IXCs regardless of whether it is CPNI. The better analysis, argues US West, is to not consider BNA as CPNI because it is not the kind of "confidential" information which the Commission has sought to protect. US West further claims that IXCs and others need BNA to operate, in the same way that directory publishers need "listed" names, and that it would be inefficient for a LEC to force an IXC to try to obtain this information some other way.[116]

56. Several parties argue that, CPNI concerns aside, BNA is still sensitive in light of our general policies favoring confidential and competitive data, and that it could be abused by, for example, marketing firms. Accordingly, they advocate clear and effective safeguards on the disclosure of this information to any requesting IXC.[117] PRTC, for example, suggests restrictions on BNA use to protect customer privacy.[118] Pactel argues that BNA should be conveyed on a per-call rather than bulk basis to avoid compromising confidential data proprietary to the LECs and to avoid violating customer privacy.[119] Pactel adds that bulk transfer could violate California privacy statutes.[120] The State of California also argues that access to billing data on a call-by-call instead of bulk transfer basis appears most consistent with the policies underlying the Commission's CPNI rules.[121]

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[112] *Notice*, 6 FCC Rcd 3509-10, n.16, paras. 30-31, *citing* Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, Report and Order, 104 FCC 2d 958, 1089 (1986); Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, 102 FCC 2d 655, 692 (1985); *BOC Safeguards Order*, 6 FCC Rcd 7571 (1991).

[113] *See, e.g.*, Integretel Comments at 11 n.20; Intellicall Comments at 8; BellSouth Comments 7-9. *See also* Bell Atlantic Comments, Appendix at 4 (IXC access to LEC BNA raises no issue under CPNI rules).

[114] Integretel Comments at 11 n.20, *citing* Filing and Review of Open Network Architecture Plans , 4 FCC Rcd 1,215 (1988).

[115] NYNEX Comments at 15 n.23.

[116] US West Comments at 16-17.

[117] NTCA Comments at 15-16; PRTC Comments at 5-6; Rochester Comments at 14-15; USTA Comments at 10-11 n.15.

[118] PRTC Comments at 5-6.

[119] Pactel Comments at 5-6. We did not propose the bulk provision of BNA in the *Notice*. However, in its comments, SNET proposed bulk provision of BNA via magnetic tape or on a casual basis as an alternative to provision through LIDB. SNET Comments at 6.

[120] Pactel Comments at 5-6.

[121] State of California Comments at 3.

57. In addition, some parties contend that the subscriber has effectively waived any possible objection to BNA disclosure by using the LEC calling card for the services of the IXC.[122] PRTC argues that the Commission must, if it orders BNA disclosure, also find that when a customer provides BNA to obtain a calling card, the customer impliedly consents to the issuer making that data available to carriers as required when the customer uses the card. PRTC maintains such a finding is necessary to protect LECs from customer complaints of unauthorized disclosure.[123] Sprint argues that CPNI protection is unnecessary because Section 705 of the Act, 47 U.S.C. § 705, already prohibits carriers from divulging to unauthorized third persons the existence or contents of communications they carry.[124]

b. Discussion

58. The record confirms our initial conclusion that BNA can be provided in a variety of ways, some of which may raise privacy concerns and questions of compliance with state disclosure laws. Although the commenting parties appear to agree with the principle that BNA disclosure raises privacy concerns, they devoted far less attention to developing disclosure limitations than they did to the issue of whether BNA is CPNI. We need not resolve this issue, however. We agree with BellSouth that the correct approach is to conclude that privacy concerns similar to those we have found with CPNI may arise if BNA is used for non-billing purposes.[125]

59. As noted above, we seek additional comment on our jurisdiction over LEC provision of BNA associated with LEC joint use cards, and on means of access to this data. We also invite commenters to address the following questions in order to assist us in resolving potential privacy issues that might arise in the event we decide to adopt regulatory requirements for LEC provision of BNA:

1. Should BNA disclosure be limited to IXCs?

2. Should recipients of BNA data be precluded from using BNA for purposes other than billing?

3. Would provision of BNA on a bulk basis raise privacy concerns different from those raised by disclosure on a per call basis?

4. Have the states established regulations governing the use of customer billing information, including BNA, which are pertinent to the issues raised in this Order?

5. Should carriers establish subscriber notification or authorization procedures before divulging BNA to third parties?

D. Types of Cards Subject to Non-discrimination Requirements

60. In the *CBT Final Order*, we found that CBT's provision of certain services and information relating to telephone calling cards jointly used for CBT and AT&T services was subject to the requirements of Title II of the Communications Act.[126] Specifically, CBT assigned and maintained in a database telephone line and RAO based account numbers for calling cards used to place both intraLATA and interLATA calls completed over the AT&T network. The database also contained Personal Identification Numbers (PINs) used by the card-holder to prevent unauthorized use of the card.

61. We observed that although considerable attention was devoted to the generation and assignment of the card account number in the *CBT Final Order*, the primary significance of the card numbering sequence lay in its association with the account information necessary to inform the inquiring carrier that an authorized user seeks to place a call with a valid calling card.[127] CBT's generation and maintenance of, and provision of access to, such updated validation information for its joint use cards was found to be an integral part of CBT's provision of exchange access services and therefore subject to Title II of the Communications Act.[128]

62. We proposed in the *Notice* to require that all LECs provide all IXCs non-discriminatory access to any such validation and billing information and services associated with LEC joint use cards, regardless of numbering format. In response to commentary in the *CBT* investigation indicating that at least some LECs may not engage in the same calling card arrangements with IXCs as CBT, we requested information describing how other LECs handle calling card operations.[129]

63. We also observed that the record in the *CBT* investigation had brought to light the apparent existence of LEC joint use calling cards employing numbering formats other than line or RAO-based numbers, in particular the Card Issuer Identification (CIID) format. The record in that investigation was not sufficient, however, to determine the effect that issuing LEC joint use cards in formats other than the subject line or RAO-based scheme would have on a LEC's Title II obligation to provide access to validation and billing data. Because we proposed to require access to these data and services for LEC joint use cards without regard to the numbering scheme of the calling card account, commenting parties were asked specifically to identify the activities performed by LECs when a calling card account is established in the CIID or other numbering format, including the maintenance of databases for such accounts.[130] As we stated in the *CBT Final Order*, the significance of the data for jurisdictional purposes does not lie in the particular numbering sequence on the face of the card, but rather its association with account informa-

[122] *See, e.g.*, Sprint Comments at 6-7; SWB Comments at 12; Comptel Reply at 17-18; Integretel Reply at 7 n.15.
[123] PRTC Comments at 5-6.
[124] Sprint Comments at 7.
[125] BellSouth Comments at 8.
[126] The *CBT Final Order* described such cards as "joint use cards."*CBT Final Order*, 6 FCC Rcd at 3501, 3504, paras. 2 and 26.
[127] *Id.* at para. 24.
[128] *Id.* at paras. 2, 20, and n.2.
[129] *Notice*, 6 FCC Rcd at 3509 n.14, para. 26.
[130] *Id.* at para. 27.

tion, derived through the provision of local exchange service, necessary to inform an IXC that a credit worthy user seeks to place a call with a valid calling card.[131]

1. LEC Joint Use Cards

a. Positions of the Parties

64. The BOCs and GTOC state that they do not issue a "LEC joint use card" as defined in the *Notice*. They claim that the *Notice*'s definition of LEC cards used to bill the services of only a "designated IXC" does not apply to the cards they issue, which may be used for the services of various carriers, and validated through open access to present LEC systems, third party validation services or LIDB.[132] SWB, for example, explains that the calling card industry has historically called such cards "shared-use" cards. According to SWB, the difference between the two is that carriers other than AT&T can validate and bill services with shared use cards, while under SWB's understanding, a "joint use" card can be validated by and used to bill services of only a single IXC.[133] Several BOCs concluded that since their cards are not used as a billing mechanism for only one designated IXC, the rules proposed in the *Notice* are inapplicable.[134] Most independent LECs state that they offer open validation to all IXCs and not to a single "designated" IXC from their own database or through US West's Service Link or another third party.[135] Under these commenters' interpretation of our use of the term "designated" in the definition of a LEC joint use card, the "joint use" cards presently in use will cease to exist with the implementation of LIDB and the rules proposed in the NPRM will become moot.

65. In response, several parties argue that the LEC calling cards currently in use, which are available for validation by more than one IXC, function as "LEC joint use cards" as defined by the Commission and therefore are not exempt from Title II requirements. MCI argues that the LECs have read the LEC joint use card definition too narrowly.[136] According to CPA, the BOCs' claim that proposed rules described in the NPRM should not apply to them is disingenuous. CPA accuses the LECs in general of nitpicking by claiming their cards are not joint use cards, and argues that it is necessary to subject all LEC cards to the proposed rules to assure IXCs and independent payphone providers (IPPs) of future non-discriminatory access to card databases.[137] Comptel requests that the Commission clarify the definition to include LEC issued cards based on telephone line and RAO numbers whether or not the cards are issued exclusively with a single IXC.[138]

b. Discussion

66. The LECs focus upon our use of the word "designated" in8. the definition of "LEC joint use card" and interpret it in a manner that would take them outside the ambit of the rules proposed in the *Notice*. There is no difference between what the industry terms a "shared use" card and the "LEC joint use" cards we find subject to the Title II requirements set forth in this Order. SWB is incorrect in its assumption that the term "designated IXC" in our definition referred to the situation of an *exclusive* arrangement between the LEC and an IXC, as was the case with CBT and AT&T. Rather, our use of that term was intended to signify the relationship SWB describes as "shared use" a LEC card which can be validated by, and used to bill the services of, multiple IXCs as a result of customer choice. The "designated" IXC referred to in our definition is the IXC designated by the caller at the time the caller places an interstate call. The record in this proceeding has failed to disclose the existence of LEC-issued and maintained calling cards in either the telephone line or RAO number format which do not fall under the definition of cards subject to Title II requirements.

2. AT&T CIID Cards

a. Positions of the Parties[139]

67. The BOCs state that they have no role in the issuance or data base maintenance of CIID format, or other similar format, cards for AT&T or any other IXC.[140] US

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[131] Because of this, we concluded in the *CBT Final Order* that the Title II obligations described therein apply equally to validation data for RAO or line-based cards that have been simply "reclassified" as CIID cards. *CBT Final Order*, 6 FCC Rcd at 3504, para. 24.

[132] *See, e.g.* Ameritech Comments at 3; Bell Atlantic Comments at 5; BellSouth Comments at 3-4; GTOC Comments at 3-6; NYNEX Comments at 2 n.2; Pactel Comments at 2; SWB Comments at 3-4; US West Comments at 3-4.

[133] SWB Comments at 3-4 n.5, SWB Reply at 1-2.

[134] Ameritech Comments at 3-4, Ameritech Reply at 3-4 (NPRM rules do not apply to carriers already providing open access to validation); Bell Atlantic Comments at 5; US West Comments at 3 n.8; BellSouth Reply at 2-3 (NPRM rules do not apply to BellSouth cards).*See also* Pactel Comments at 2 (Pactel does not issue joint use cards, but Commission should focus its attention on those LECs which do).

[135] PRTC Comments at 2; Rochester Comments at 2-5; SNET Comments at 2. *See also* NTCA Comments at 3-8 (small LECs have never participated in exclusive type of relationship with AT&T described in the *Notice);* OPASTCO Comments at 56; USTA Comments at 2-3, 5-7. United is the only LEC stating that it currently has exclusive card validation agreements with AT&T, which limit United's ability to make its validation data for RAO cards available to other IXCs. United states that it will do so if the Commission so directs in this proceeding. United Comments at 2.

[136] MCI Reply at 4-6.

[137] CPA Reply at 2-3.

[138] Comptel Reply at 8-10.

[139] A number of commenters discussed rule changes and requirements that are beyond the scope of this rulemaking and we therefore do not address them here. In particular, some commenters advocate that the Commission require changes in the card practices of IXCs. *See* Emergency Motion For An Interim Order Requiring AT&T To Cease Further Distribution of "Proprietary" CIID Cards And Permit Validation And Billing Of Existing Cards Pending a Final Decision In This Docket, filed by CompTel and nineteen of its Operator Service Provider (OSP) members, dated December 20, 1991, and responsive pleadings thereto, dated February 10, 1992. In a Notice of Proposed Rulemaking adopted today in CC Docket No. 92-77, we begin a rulemaking that will examine issues related to IXC card practices. Therefore, we will include as part of the record in that proceeding the CompTel motion and pleadings filed in response to Public Notice, DA 91-1628, dated December 27, 1991.

[140] Bell Atlantic Comments, Appendix at 3; BellSouth Comments at 4-5; NYNEX Comments at 4-5; SWB Comments at 5. *See also* US West Comments at 8-10.

West, for example, explains that cards in the CIID format utilize a six-digit card issuer identification number, assigned by Bell Communications Research, Inc. (Bellcore), acting as administrator of the North American Numbering Plan, plus a four-digit account number and a four-digit PIN assigned by the card issuer. The CIID format is available to card-issuing IXCs, but not to BOCs and other LECs. &The CIID plan was developed for these carriers so that they could issue their own 14-digit calling cards in a format which could be validated by the BOCs for intraLATA calls pursuant to mutual card honoring agreements. Thus, US West asserts, while LECs can validate CIID cards, with certain modifications to operator services and billing systems, LECs cannot issue CIID billing cards, and such cards should not be considered LEC joint use cards.[141] US West also states that cards in the CIID format are not currently resident in its LIDB validation database, and that CIID validation queries must be directed to the card issuer's database.[142]

68. NYNEX explained that the BOCs are in the process of deploying their LIDB validation database to replace the predivestiture arrangement which relied on AT&T's Billing Validation Application (BVA) database. The BVA is the system which actually receives the validation query and returns the validation response when a calling card call is made. NYNEX stated that, until recently, AT&T and the BOCs validated all BOC and AT&T calling card calls using the BVA. The BVA was updated and maintained by data transfers from the BOCs' Data Base Administration System (DBAS) each business day and on an emergency "on-line" basis where necessary (for example, to deactivate lost or stolen cards). NYNEX further explained that while the BOCs can access the BVA and honor CIID calling cards for intraLATA calls, the BOCs do not issue, maintain or update the AT&T CIID card data in the BVA. AT&T is the only IXC which has issued CIID format calling cards.[143]

69. The independent LECs concur that CIID card validation data is not itself maintained by LECs, and that CIID validation data will not be loaded into the LIDB validation databases.[144] USTA argues generally that CIID cards are different from line and RAO-based cards; that the CIID format was intended to eliminate the structural discrimination that previously existed in the calling card market, and that such cards do not present the facts or concerns that motivated the *CBT* investigation or this NPRM.[145]

70. ECBT states that its participation in the CIID format plan will be limited to sponsoring the IXC in the Call Message Distribution System (CMDS)[146] for call detail routing purposes, if requested by an IXC, and temporarily providing BVA validation data updating services through DBAS. CBT maintains that the LEC will not assign, or have access to, the CIID card number. CBT also states that LEC DBAS owners "temporarily" have access to CIID card numbers in order to update AT&T's BVA. CBT noted that the BVA was due to expire at the end of 1991. According to CBT, the IXC will arrange for CIID billing, but if it chooses a LEC to bill LEC subscribers, the IXC will not provide the CIID calling card number to the LEC. Rather, the IXC will translate the CIID number to a billing telephone number and send that number to the LEC with the call detail; the CIID number will not be included in the billing detail.[147]

71. AT&T states that none of its CIID cards are LEC joint use cards as defined in the *CBT Final Order* and *Notice* because the issuance and maintenance of the cards does not relate to or depend upon data collection or other activities performed by LECs in the course of providing local exchange service. On the contrary, AT&T contends, its CIID cards are "IXC joint use cards" as defined in the Notice, because the IXC supplies the number, provides the service for itself and a designated LEC, and maintains the database.[148] AT&T argues that it alone assigns the CIID account number, maintains the validation database, and undertakes other calling card operations, without depending on a LEC to perform any functions in the course of local exchange service.[149] AT&T argues that this is true even with respect to CIID cards that have been converted to that format from former RAO codes, because these cards are now treated no differently from newly-issued CIID cards. That is, AT&T has made its own new arrangements for all functions relating to acceptance, validation, maintenance and updating of these accounts, and for billing and collection. This conclusion is not, according to AT&T, altered by the fact that AT&T has elected to have a LEC contract to perform some of the tasks associated with maintaining account information or validating the IXC's joint use cards.[150]

72. AT&T further contends that imposition of the nondiscriminatory validation requirements on its CIID cards would be anti-competitive. It argues that a proprietary card (*i.e.*, a card issued by AT&T for which AT&T will not make the validation data available to other IXCs) is one way in which it engages in competition with other IXCs who also issue proprietary cards. AT&T states that it has made a substantial investment in establishing the CIID card to promote usage of its own network, and it should not be forced to make these cards available for use on a competitor's network, in effect giving the competitor a free ride.[151]

73. Opponents of AT&T CIID cards (OSPs, payphone providers, OSP equipment providers and other IXCs) argue that such cards either fit the definition of LEC joint use cards or are the functional equivalent of LEC joint use cards because they are used for the services of both the IXC and the LEC, and there are various functions in the process of account number assignment and database maintenance in which they believe heavy LEC involvement exists now and will continue in the future.[152] CompTel

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[141] US West Comments at 9-10. *See also* BellSouth Comments at 4-5 (stating it is prepared to honor CIID cards for any other IXC); NYNEX Comments at 2-3, 5.

[142] US West Comments at 6. *S ee, e.g.,* SWB Comments at 6, SWB Reply at 23; Ameritech Reply at 4-6.

[143] NYNEX Comments at 4-5.

[144] CBT Comments at 4; United Comments at 3. *See also* Rochester Reply at 5, n.1.

[145] USTA Comments at 4-5.

[146] CMDS is the mechanism through which AT&T receives all the call records billed to its CIID cards.

[147] CBT Comments at 6.

[148] AT&T Comments at 2-6.

[149] AT&T Comments at 4-6.

[150] AT&T Comments at 7.

[151] *Id.* at 7-8.

[152] CAPA Comments at 3-4; CCS Comments at 3-4, CCS

and Nycom describe how the CIID card format was developed by Bellcore in response to an order from the MFJ Court. The first three of the six digit CIID code prefixes were taken from the existing RAO code system. Originally, Bellcore was to assign RAO code numbers to IXCs which had not previously been assigned; IXC choice of codes was not permitted.[153] CompTel and Nycom also claim that AT&T persuaded Bellcore to alter the original CIID plan to enable AT&T to convert the RAO numbers it already had attempted to use for proprietary purposes into CIID cards (which these parties call "converted RAO cards") without having to reissue these cards.[154]

74. In addition, CompTel and Nycom contend that the Bellcore plan changes made it possible for AT&T to use an even broader array of RAO numbers, based on either numbers shared with a given LEC or on numbers never assigned to a LEC, thereby forming two classes of "new" CIID cards. They argue that the two identified classes of new CIID cards are encompassed by the *CBT Final Order* principle. In the case of new CIID cards whose number includes RAO numbers shared with a BOC, CompTel and Nycom argue that the Bellcore plan requires the IXC to make certain arrangements with the BOC for sharing the number, thereby significantly involving that BOC in supply of the number. In the case of new CIID cards whose number includes RAO codes never assigned to a BOC, the opponents of AT&T CIID cards contend that Bellcore's role in assigning the first three digits of the code likewise involves the BOCs in supply of those numbers.[155] These parties also maintain that the *CBT Final Order* has already held that converted RAO cards are subject to open validation.[156] They conclude that Bellcore's continued role in managing numbering codes for new CIID cards makes these new cards no different legally from the RAO and line-based LEC joint use cards described in the Notice.[157]

75. Opponents of AT&T's CIID card further argue that they believe the BOCs remain heavily involved with CIID card database maintenance and access, and that the relationship of AT&T and the BOCs in the generation and processing of CIID cards does not appear to differ materially from their interaction in servicing joint use cards.[158] They argue that AT&T's CIID card arrangements have changed only the form, and not the substance, of the previous shared card and account relationship between the BOCs and AT&T. These parties acknowledge that there is incomplete public information available concerning how the LECs and AT&T interact with respect to CIID card validation and "billing.[159] Nonetheless, they present circumstantial evidence in support of their claim that AT&T CIID cards fall under the definition of LEC joint use cards, and thus Title II requirements.

76. CompTel and Telesphere, for example, state that CIID card numbers must be stored in a validation database that is available to the IXC for interLATA calls and to the LEC for intraLATA calls, and that it must be capable of being associated with BNA for billing. They assert that AT&T will be maintaining a proprietary (or closed) validation database for its CIID cards and will also maintain a translation database for translating CIID numbers into telephone line or other account numbers for billing by the LECs. Both conclude that the LECs' involvement in the maintenance of the AT&T billing translation database must be the same as their previous involvement in the DBAS/BVA shared database. Both parties also assert that the LECs' level of involvement in the databases appears to depend on whether the CIID card is based on an RAO number shared with the LEC or an unassigned RAO number, but that the end result is essentially the same. In either case, AT&T must employ a "translation" program to convert the call records into a telephone line number, which is the only format that the LECs billing systems recognize. In order to perform this translation, AT&T must maintain a database with up-to-date end user line number information. CompTel and Telesphere therefore conclude that heavy LEC involvement in the creation and maintenance of the critical translation database appears, by necessity, to be required, and that just as the LECs maintained the BVA through DBAS under the old shared system, they will update the AT&T billing validation databases for CIID cards.[160] CompTel maintains that all 0+ calling cards, including CIID cards, necessarily require LEC participation in number assignment, validation and billing in order to function. Accordingly, CompTel concludes that AT&T CIID cards come under the definition of LEC joint use cards subject to the nondiscrimination provisions of the Act.[161]

77. In support of the above characterization of the LECs' involvement in CIID databases, CNS claims that information indicating that the LECs are providing the account information used to maintain the AT&T CIID calling card database was recently uncovered as a result of a proceeding before the Public Utility Commission of Texas (Texas PUC).[162] CNS relates that Southwestern Bell, and possibly other BOCs, have secret agreements for provision of BOC account maintenance services for AT&T, which are used to maintain the CIID card customer database. CNS states that the Texas PUC proceeding disclosed that the information provided pursuant to these agreements is collected by LEC representatives in the normal course of their business. According to CNS, pursuant to these agreements, LECs are providing AT&T with online updates of any changes in the names or addresses (*i.e.*, BNA) of holders of AT&T's calling cards. CNS surmises that without this LEC-supplied information, AT&T could

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Reply; CNS Comments at 13-18, CNS Reply; Comptel Comments at 28-35, Comptel Reply at 11-13; Nycom Comments at 19-21, Nycom Reply at 4-7; Telesphere Comments at 24-29; VAC Comments at 6-10; Intellicall Reply at 11-13.

153 CompTel Comments at 24-28; Nycom Comments at 13-19.

154 CompTel Comments at 25-27; Nycom Comments at 13-17. *See also* VAC Comments at 6.

155 CompTel Comments at 28-30; Nycom Comments at 19-20.

156 CompTel Comments at 27-28; Nycom Comments at 17-19.

157 CompTel Comments at 29-30, 35; Nycom Comments at 19-20.

158 CAPA Comments at 3-4; CNS Comments at 15-18, CNS Reply at 14-18; CompTel Comments at 30-34; Nycom Comments at 20; Telesphere Comments at 26-28. *Accord* Intellicall Reply at 11-13.

159 CAPA Comments at 4 n. 8; CompTel Comments at 30; Telesphere Comments at 28.

160 Comptel Comments at 30-33; Nycom Comments at 20; Telesphere Comments at 25-28.

161 Comptel Reply at 11.

162 CNS Comments at 17-18, *citing* Application of Southwestern Bell Telephone Company to Approve Account Maintenance, a New Intrastate Access Service, Texas PUC Docket No. 10064 (filed February 19, 1991).

not ensure the accuracy of its CIID customer database and, as a practical matter, probably would not be able to issue CIID cards. CNS concludes that the account maintenance arrangements render the AT&T CIID cards the functional equivalents of LEC joint use cards.[163]

78. In further support of the claim that heavy LEC involvement is present with respect to AT&T's CIID card database, Comptel and CAPA point to the Compliance Report filed by CBT in response to a requirement of the *CBT Final Order*, allegedly showing that CBT or its affiliate CBT Information Systems (CBIS) continues to provide AT&T with system processing, database maintenance, development and modification of the AT&T CIID card database, assignment of PIN numbers, maintenance of validation data and bill generation for AT&T CIID cards.[164] On the basis of their information and beliefs about how CIID cards are issued and maintained, several parties have specifically requested that the LECs be ordered to provide CIID card validation services.[165]

79. CBT, in its reply, reiterates that AT&T CIID cards should be considered IXC joint use cards because LECs do not assign CIID card numbers, and do not maintain CIID validation databases. CBT again acknowledged that until the expiration of the BVA on December 31, 1991, AT&T was forwarding CIID card numbers to a LEC owning a DBAS in order to update the BVA, but that with the scheduled expiration of the BVA, AT&T will update its own proprietary database and "will not be dependent on LEC interface activities."[166] In addition, CBT takes issue with the descriptions of LEC involvement in the CIID card system contained in many IXC comments. CBT explained that some commenters misinterpreted the Bellcore document regarding CIID and CMDS-sponsoring to imply greater LEC involvement with CIID cards than actually exists. CBT states that CMDS routes only call message detail and does not provide access to validation or billing name and address.[167] CBT acknowledges that AT&T does receive presubscribed customer account information through Customer Account Record Exchange (CARE) reports, just like any other IXC, and these reports contain BNA and other information, but CARE reports do not contain credit or credit card information. Yet CBT acknowledges that some IXCs evidently merge the CARE information with their own databases of credit card accounts once they have received the reports from the LECs.[168]

80. In its reply, AT&T denies that its CIID cards are LEC joint use cards on the basis of the numbering scheme. AT&T asserts that although Bellcore assigns the CIID codes, Bellcore is acting only as administrator of the North American Numbering Plan, not as an agent on behalf of a local exchange company in the course of local exchange service.[169] AT&T maintains that LEC involvement is unnecessary in issuing CIID format cards. Nor is the issuance and maintenance of the cards, according to AT&T, dependent upon or related to data collection or other activities performed by LECs in the course of providing local exchange service.[170]

81. AT&T further responds that the contention that AT&T CIID cards are functionally equivalent to LEC joint use cards is premised on numerous material factual errors. AT&T states that Telesphere's assertion that the LECs will update the AT&T billing validation database for CIID cards is incorrect. Only CBT and SNET currently update BVA with information pertaining to CIID cards, according to AT&T, and they do not use information obtained in the course of providing local exchange service.[171] Rather, the information is billing information generated by AT&T, and they are only performing this function for the limited period of time during which AT&T and the LECs are implementing alternatives to the BVA/DBAS shared environment.[172] AT&T also denies that the LECs are heavily involved in the creation and maintenance of the "translation" database whereby AT&T translates CIID call records into telephone line numbers for distribution to the appropriate LECs for billing. AT&T claims that it maintains its own database for this purpose.[173]

82. AT&T contends that CNS has misrepresented AT&T's relationship with the LECs. According to AT&T, the account maintenance agreement between AT&T and SWB does not relate to CIID format cards. Moreover, AT&T asserts that SWB and other LECs now provide identical data to all IXCs under the CARE process as part of their equal access responsibilities.[174] AT&T further maintains that the commenters are factually incorrect about the role CBT plays in AT&T's CIID card business. AT&T asserts that the data at issue are generated by AT&T, not by either CBT in the course of providing local exchange service, or by CBIS in its billing and collection activities, and that they are given to CBT merely for uploading into AT&T's BVA.[175] Attempts to analogize AT&T's former relationship with the LECs under the Shared Network Facilities Agreements[176] (SNFAs) are also misplaced, argues AT&T, because under the SNFAs, AT&T and the LECs shared information collected by LECs in DBAS and the BVA. In contrast, validation data concerning AT&T's CIID format cards is generated and maintained only by AT&T and is proprietary to AT&T.[177]

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[163] CNS Comments at 15-18.

[164] CAPA Comments at 3-4, n.8. *See also* Comptel Comments at 33-34; Nycom Comments 18-19; Telesphere Comments at 28-29.

[165] *See e.g.*, CAPA Comments at 4; CNS Comments at 4; CompTel Comments at 3; Nycom Comments at 9; Telesphere Comments at 53; VAC Comments at 6.

[166] CBT Reply at 6, n.15.

[167] CBT Reply at 8.

[168] CBT Reply at 9, n.25.

[169] AT&T Reply at 5, n.**.

[170] AT&T Reply at 2-8.

[171] SNET did not address this issue in its comments.

[172] AT&T Reply at 4-5.

[173] AT&T Reply at 5 n.*.

[174] AT&T Reply at 3 n.***. SWB concurs that Account Maintenance (AM) will not provide AT&T with calling card verification on AT&T CIID cards. SWB explains that AM is a rate element in SWB's billing and collection contracts; it is not the subject of a separate contract, and it is available to any carrier. SWB Comments at 10 n.12.

[175] AT&T Reply at 7.

[176] *See, e.g.*, CNS Comments at 16-17.

[177] AT&T Reply at 5 n.*. *Accord* Ameritech Reply at 4-6; BellSouth Reply at 2-3; Nynex Reply at 2; SWB Reply at 2.

b. Discussion

83. One of our central concerns in the *CBT* tariff investigation and the related *Notice* was whether certain cards claimed by AT&T as its own, namely the CIID cards, should instead by treated as LEC joint use cards subject to the validation and BNA disclosure rules of the *Notice*. In order to make this determination, we requested specific information on a LEC's activities when a new CIID card account is established, but more importantly, the LEC's role in maintaining and updating the validation database for the account on an on-going basis.[178] Consistent with our jurisdictional analysis in Section II.A.1., *supra*, the key determinant is LEC involvement with the creation and maintenance of the card database for validation purposes.[179] Thus, while the comments focussed on the significance of the origination of the CIID numbering format, that factor alone is insufficient to establish that AT&T CIID cards should be treated as LEC joint use cards as defined in this proceeding.

84. Many of the comments discussing the LECs' role with respect to the AT&T CIID card databases contain more speculation than hard fact. As these parties admit, the publicly available information on the LEC/AT&T interaction with respect to AT&T CIID cards is incomplete. AT&T steadfastly maintains that it creates and maintains its own CIID card validation and CIID number translation databases. While AT&T does not disclose the nature or origin of the information these databases contain, it staunchly asserts that the maintenance of its CIID cards does not relate to or depend upon data collection or other activities performed by LECs in the course of providing local exchange service. The LECs generally deny involvement through Bellcore in the assignment of CIID card numbers and specifically deny the allegation that they perform any validation functions for these cards other than to honor them for intraLATA calls pursuant to contracts with AT&T, although they too have not provided particulars about their role in the overall calling card message processing system utilized by AT&T for CIID card usage. CBT, alone among the LECs, admitted playing an affirmative role in CIID account establishment and database maintenance. However, AT&T explains that CBT and SNET are the exceptional cases in that they have a limited, temporary role in updating its CIID card validation data in the BVA, and claims that the account information they load into the BVA originates with AT&T rather than the LECs.

85. We therefore cannot conclude, on the record before us, that AT&T's new CIID cards either fall under the definition of "LEC joint use cards" contained in the *Notice*, or are the "functional equivalents" of such cards.[180] Although the commenters have presented a circumstantial picture of LEC involvement in CIID card billing and collection support activities, there is no direct evidence that AT&T's CIID card validation database is maintained by the LECs, or that the data contained therein are by-products of LEC local exchange activities. To the contrary, the record clearly demonstrates that AT&T is implementing and maintaining its own proprietary CIID card validation database and that the LECs have access to this database solely for purposes of validating AT&T CIID cards for intraLATA calls. AT&T CIID card validation data is not contained in the LEC's LIDB databases. The record further demonstrates that the LECs do not directly update and maintain AT&T's proprietary CIID database, as they did the BVA through their DBAS, with account status data derived through the provision of local exchange service and therefore do not appear to be in a position to provide other IXCs with access to AT&T's CIID validation database.

86. Even assuming that the LECs provide AT&T with account status or "account maintenance" data under the CARE system or detariffed billing and collection agreements, and assuming further that AT&T uses such data in conjunction with data of its own for card validation purposes, such LEC activities would not convert AT&T's CIID cards into LEC joint use cards for purposes of applying our non-discriminatory access rules. To decide the issue otherwise would mean potentially subjecting to our nondiscriminatory access requirements the calling card of every IXC which utilizes in its validation database LEC account maintenance information received under detariffed billing and collection contracts or received in CARE reports as a result of LEC equal access responsibilities. AT&T's CIID cards are appropriately considered IXC joint use cards as defined in the *Notice*, and as such, are not subject to the access requirements we impose on LECs with respect to LEC joint use cards.

E. LIDB Rate Structure

87. In the *Notice*, we invited comment on the appropriate rate structure for the LECs' provision of access to validation information.[181] We also observed that the BOCs were implementing LIDB service as the means of providing IXCs access to validation data. Prior to the filing of comments and replies in this docket, SWB, on June 11, 1991, filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish a new rate element for its common channel signalling (CCS) interconnection service (CCS Interconnection Waiver Petition). On June 14, 1991, SWB filed a related petition for waiver of Part 69 to establish two new rate elements for providing access to the data in SWB's LIDB (LIDB Waiver Petition).[182] Numerous comments and replies were filed in

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[178] That database presumably contains information indicating that (1) the card number and PIN are valid, (2) the cardholder's account is current and (3) the message can be billed to that account.

[179] *See also CBT Final Order*, 6 FCC Rcd at 3504, para. 24; *Notice*, 6 FCC Rcd at 3507, paras. 11-12.

[180] Our conclusion as to CIID format cards bearing converted RAO-code numbers in the *CBT Final Order* remains unchanged. 6 FCC Rcd at 3504, para. 24.

[181] *Notice*, 6 FCC Rcd at 3510, para. 32.

[182] LIDB service uses common channel signalling (CCS) network capabilities. Many of the carriers' services like LIDB that use CCS network capabilities will require the LECs and their customers to interconnect their CCS networks. CCS interconnection service consists of a 56 kilobit per second (kbps) dedicated link connecting the IXCs' CCS networks to the signalling transfer points (STPs) on the LECs' CCS networks. This service enables the IXC to, *inter alia*, transmit queries to LEC databases, such as LIDB, for purposes of calling card validation or third party billing information. *See SWB Waiver Order*, 6 FCC Rcd at 6098, para. 22. BellSouth, NYNEX, and Bell Atlantic had also filed LIDB waiver petitions, which were subsequently modified in some respects (see note 183, *infra*): BellSouth petition for waiver of Part 64 of the Commission's Rules regarding the

response to the two waiver petitions, which addressed both the issue of whether LIDB access service falls into the category of previously detariffed billing and collection services and therefore should not be tariffed, and the merits of SWB's proposed rate elements.[183] Subsequently, comments and replies were filed in this docket on rate structure which, for the most part, incorporated by reference the comments filed in the waiver proceeding. The comments and replies filed in this docket were all filed prior to the release of the *SWB Waiver Order*. We shall first summarize this commentary, and then discuss the *SWB Waiver Order*.

1. Positions of the Parties

88. WSWB assumed that LIDB validation service does not fall within the definition of billing and collection services in the *Billing and Collection Detariffing Order* and is a Title II, 8service that must be tariffed.[184] Accordingly, SWB maintained that the most effective method of recovering the costs associated with this offering is through tariffed offerings.[185] SWB recommended the rate structure contained in its waiver petitions for LIDB access and CCS interconnection. In its LIDB Waiver Petition, SWB sought to establish two new rate elements for LIDB Access Service, consisting of a LIDB Query Charge and LIDB Access Service Establishment Charge. These charges would recover the costs of the LIDB itself and the processing of IXC queries in the LIDB. In its CCS Interconnection Waiver Petition, SWB sought to establish a new rate element for Common Channel Signaling/Signaling System 7 (CCS/SS7) Interconnection Service. CCS/SS7 Interconnection Service provides the customer interconnection with SWB's CCS network (at its signalling transfer point or STP) over which queries to the LIDB can be transmitted.[186] SWB proposed two rate elements for its CCS/SS7 Service: the "STP Access Mileage" and "STP Port Termination." SWB sought to provide STP Access Mileage as a Special Access service pursuant to its Special Access tariffs. SWB sought to provide STP Port termination as a new subelement in the Transport element, and to create a flat monthly fee per customer port on the STP.[187]

89. Other LECs addressed the question of cost recovery for the actual transport of the LIDB query. BellSouth said LIDB transport should be provided under tariff on a non-distance sensitive basis and priced at a flat rate per query. BellSouth stated that it had requested authorization to establish a specific rate element which will recover the costs of LIDB transport service.[188] NYNEX also referred to its pending waiver to allow its companies to recover the costs associated with the LIDB system by allocating those costs to the third party billing and collection service cost category. NYNEX stated that its companies planned to charge $.04 per LIDB query, and that this charge would recover the costs of the facilities used to provide LIDB validation service, including portions of the LIDB database and related overheads, portions of the STPs, the SCPs, and the signalling links from the IXC's SPOI to the companies' STPs and from the companies' STPs to the LIDB SCP.[189]

90. US Sprint recommended two discrete rate elements for access to validation and screening data through LIDB: a transport element, assessed on a uniform per-query basis, covering the cost of transporting the query between the SS7 STP and the LIDB, and a uniform charge per-query for the use of the LIDB database itself.[190] MCI proposed that LIDB validation service be deemed a "non-chargeable" tariff feature. MCI reasoned that the LECs should absorb any costs related to validation because LECs already benefit in two ways in the calling card market: (1) by completing LEC calling card calls, the IXCs add value to the LEC card and (2) the LECs already receive switched access revenues for calls completed over the IXC network. In the alternative, MCI argued that any validation access charge imposed should be a per-call, cost-based charge so that IXCs pay for the service based on usage.[191] Centel disagreed with MCI's contention that the LECs should absorb LIDBrelated costs, arguing that the IXCs desire validation services and receive a substantial benefit from them, as well as the use of their interexchange services by the LECs' calling card customers, and so should bear the costs. Centel disputes MCI's suggestion that LECs already recover those costs through their existing access charges.[192]

91. Several OSPs and equipment providers commented on rate structure. CNS suggests that validation services should be tariffed on a per call basis.[193] Similarly, Intellicall urges that validation data be provided on a per-query, unbundled basis to ensure its availability to smaller entities.[194] ITN, a provider of SS7 network services, argues that LIDB validation and LIDB transport services be offered as discrete and competitive services, on an unbundled basis.[195]

2. SWB Waiver Order

92. Subsequent to the filing of comments in this docket, the Common Carrier Bureau, in the *SWB Waiver Order*, concluded that SWB should be granted an interim waiver to establish appropriate rate elements pending the out-

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separation of costs of regulated telephone service from costs of regulated activities and Part 69 of the Commission's Rules, filed Nov. 27, 1990; NYNEX petition for waiver of Part 69 of the Commission's Rules, filed Apr. 15, 1991; and Bell Atlantic Petition for waiver of Part 69 of the Commission's Rules to provide access to line information data base (LIDB), filed Jun. 24, 1991.

[183] *See SWB Waiver Order*, 6 FCC Rcd at 6096-97, paras. 5-17; *id.* at 6098-99, paras. 23-28. Following release of the *SWB Waiver Order*, Ameritech, Bell Atlantic, BellSouth, GTOC, NYNEX, Pactel, United, and US West filed petitions for waiver of Part 69 of the Commission's Rules, or amendments to their petitions for waiver of Part 69, to establish the LIDB rate elements which the Commission permitted SWB to establish in the *SWB Waiver Order*. The Commission granted these waivers. *See* Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (1991).

[184] Most LECs disputed that conclusion. *See supra* note 18.

[185] SWB Comments at 14.

[186] *See supra* note 183.

[187] *SWB Waiver Order* at para. 23.

[188] BellSouth Comments at 10-11.

[189] NYNEX Comments at 7-8.

[190] US Sprint Comments at 8.

[191] MCI Comments at 9.

[192] Centel Reply Comments at 4-5. *Accord* Bell Atlantic Reply at 5-6; NYNEX Reply at 3 n.4; Pactel Reply at 3.

[193] CNS Reply Comments at 12.

[194] Intellicall Comments at 8.

[195] ITN Comments at 2-6.

come of this, and other related, rulemaking proceedings.[196] Specifically, the Bureau granted SWB's LIDB Waiver to establish new Part 69 rate elements for the provision of LIDB service.[197] However, the Bureau did not approve the precise subelements described in SWB's LIDB Waiver Petition.[198] SWB had proposed two new rate elements for LIDB service. The non-recurring costs would be recovered through a LIDB Access Service Establishment Charge, designed to recover costs associated with assigning originating point codes to parties seeking to validate SWB calling cards. The recurring costs would be recovered through a LIDB Query Charge, which would apply on a per-query basis, to each request to validate transmitted by a customer to SWB's LIDB. The single per query charge, as proposed by SWB, was designed to recover the costs of STP facilities, transport from STP to LIDB (SCP), and the costs of maintaining and updating LIDB data. The Bureau directed that the costs underlying the per query charge to be recovered through two separate charges, one for the STP facilities and transmission lines to the SCP, and one for the LIDB costs.[199] The Bureau observed that, in the future, LECs may be required to offer these elements separately.[200]

93. The Bureau also granted SWB's CCS Interconnection Waiver to the extent that the waiver contemplated creation of a subelement in the Transport element for a flat monthly charge for its STP port charge, while denying the waiver to the extent SWB assumed that a dedicated switched transport service could be tariffed as Special Access. The Bureau found good cause for the creation of a new Transport subelement for STP Port Termination, reasoning that a separate rate element would ensure that the costs of the STP port are recovered from the "cost causer," *i.e.*, the customer ordering the dedicated port. Since the port will be dedicated to a particular customer, those costs will not be incurred by the LEC on a usage-sensitive basis and it is therefore reasonable to establish a flat rate. The Bureau further concluded that the costs of the transmission facilities between the IXC's CCS network and the LEC's STP should be recovered as a subelement in the Transport element because the link between the IXC signaling point of interconnection (SPOI) and a LEC STP will be used to deliver, or facilitate delivery of, switched services offered by IXCs. Because these facilities are used on a dedicated basis, the Bureau agreed with SWB that the charge for CCS interconnection service should be a flat, per line charge.[201] Although pricing the signalling link on a flat rate basis differed from the bottom-line result of the rate structure freeze in this Commission's *Transport Order*,[202] the Bureau found a flat rate for this particular subelement satisfies all three of the goals for Transport pricing established in the portion of that order discussing the Commission's proposed transport rulemaking.[203]

3. Discussion

94. We conclude that LIDB query services should be recoverable under the new LIDB Access element that has been established pursuant to the *SWB Waiver Order*. We have decided therefore to amend Part 69 of our Rules to establish one new switched access element for "LIDB Access," which will have two subelements. These amendments appear in Appendix B of this Order.

95. In the *SWB Waiver Order*, the Bureau correctly determined that SWB should not be permitted to bundle all LIDBrelated costs into one element. These costs are properly recoverable under separate charges: one for the transmission link between the LEC STP and the LEC SCP (*i.e.*, the LIDB database) and one for the database look-up itself. At the present time, any user of the LECs' LIDB must take both the transmission and the database look-up components of the LIDB query service. This is so because at present, the LECs will only permit access to LIDB by way of the LEC STP. In the future, however, the provision of direct access to LIDB (*i.e.*, connection directly to the SCP rather that through the LEC's SCP) may be warranted. Therefore, the establishment of separate transmission and database look-up elements at this time will provide a rate structure with sufficient flexibility to respond to future developments. We also conclude that such costs should be recovered on a per query basis.

96. CCS Interconnection service will provide transmission between an IXC SPOI and the LEC's STP. It will facilitate non discriminatory access to LIDB as well as other CCS-based services. The Bureau concluded in the *SWB Waiver Order* that the costs associated with CCS interconnection should be recovered through the creation of new Transport subelements for (1) the link between an IXC SPOI and the LEC STP and (2) the dedicated STP port. The Bureau also concluded that these elements should be charged at a flat rate.

97. We agree that the rate structure for Transport subelements established pursuant to the *SWB Waiver Order* appears to be appropriate for this purpose. Nevertheless, we will defer the adoption of revised rules for Transport elements until we have completed the *Transport Rulemaking* in order to ensure that all revisions are consistent with each other and with conclusions that we may reach in that proceeding. Carriers may continue to provide services pursuant to the *SWB Waiver Order* and similar waivers granted to other carriers until new rules become effective.

III. CONCLUSION

98. In this *Report and Order*, we review certain LEC calling practices and services and conclude that they are subject to the requirements of Title II of the Communications Act. Accordingly, we require that the LECs provide all requesting IXCs with nondiscriminatory access to LEC

196 *SWB Waiver Order*, 6 FCC Rcd at 6097-98, para. 20-21. SWB's proposed LIDB validation service rate structure was not opposed by any party in that proceeding; however, several parties took issue with SWB's proposed LIDB transport rate structure. *Id.* at 6098-99, paras. 20, 24-26.

197 *Id.* at 6095, 6098, paras. 2, 20.

198 *Id.* at 6098, para. 21.

199 The LIDB database is physically located at the SCP; we sometimes use the two terms interchangeably in this Order.

200 *Id.*

201 *Id.* at 6099, para. 30.

202 6 FCC Rcd at 5344.

203 *Id.* at 5343-45.

joint use card validation data and LEC screening data, and contractual arrangements for the acceptance of IXC joint use cards for LEC services, if the LEC enters into such an agreement with one IXC. We also amend Part 69 of our rules to incorporate a new switched access element for "LIDB Access," which will have a transmission subelement and a query look-up subelement. Final decision on an appropriate rate structure for the LIDB transport elements must await completion of the *Transport Rulemaking*. We will keep this docket open as a notice and comment rule making proceeding to receive additional comment on the issues of BNA services as described in paragraphs 46, 52 and 59 above. Therefore, the *ex parte* requirements discussed in paragraphs 41-44 of the *Notice* continue in effect.[204]

IV. ORDERING CLAUSES

99. Accordingly, IT IS ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

100. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau is delegated authority to act upon matters pertaining to implementation of the policies, rules and requirements set forth herein.

101. IT IS FURTHER ORDERED that pursuant to authority contained in Sections 1, 4, 201-205 and 208 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, and 208. Part 69 of the Commission's Rules, 47 C.F.R. Part 69 IS AMENDED as set forth in Appendix B.

102. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 U.S.C. §§ and 1.419, supplemental comments as requested in paragraphs 54 and 61 above SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before **June 10, 1992.** Reply Comments SHALL BE FILED as indicated above on or before **June 25, 1992.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

103. IT IS FURTHER ORDERED that the provisions in this Report and Order and Request for Supplemental Comment will be effective 30 days after FEDERAL REGISTER publication.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS FILED IN CC DOCKET NO. 91-115

Advanced Communications Technologies (ACT)

Americall Systems of Louisville and Cleartel Communications, Inc., First Phone of New England, Inc., U.S. Long Distance, Inc. (Americall)

American Public Communications Council (APCC)

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Austin PayFones, Inc. (Austin)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Telephone Companies (BellSouth)

California Payphone Association (CPA)

Capital Network System, Inc. (CNS)

Central Atlantic Payphone Association (CAPA)

Central Telephone Company (Centel)

Cincinnati Bell Telephone Company (CBT)

Competitive Telecommunications Association (CompTel)

Consolidated Communications Operator Services, Inc. and Illinois Consolidated Telephone Company, Consolidated Network, Inc., Consolidated Communications Public Services (CCS)

Digital Network Services (DNS)

Fone America, Inc. (Fone)

GTE Service Corporation and affiliated domestic GTE telephone operating companies (GTOC)

Independent Telecommunications Network, Inc. (ITN)

Integretel, Inc. (Integretel)

Intellicall, Inc. (Intellicall)

Mastercard International Incorporated and VISA U.S.A., Inc., California Bankers Clearing House Association, The New York Clearing House Association (Mastercard)

MCI Telecommunications Corporation (MCI)

Metromedia Communications Corporation (Metromedia)

National Exchange Carrier Association (NECA)

National Telephone Cooperative Association (NTCA)

Nycom Information Services, Inc. (Nycom)

NYNEX Telephone Companies (NYNEX)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Pacific Bell and Nevada Bell Companies (Pactel)

PayTelephone of Pennsylvania, Inc. (Penn PayTel)

[204] *See Notice*, 6 FCC Rcd at 3510.

People of the State of California and Public Utilities Commission of the State of California (State of California)

Puerto Rico Telephone Company (PRTC)

Rochester Telephone Corporation (Rochester)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)

Telesphere Communications, Inc. (Telesphere)

United States Telephone Association (USTA)

United Telephone System Companies (United)

US Sprint Communications Company Limited Partnership (Sprint)

US West Communications, Inc. (US West)

Value-Added Communications, Inc. (VAC)

REPLY COMMENTS FILED IN CC DOCKET NO. 91-115

Americall Systems of Louisville and Cleartel Communications, Inc., First Phone of New England, Inc., U.S. Long Distance, Inc. (Americall)

American Telephone and Telegraph Company (AT&T)

Ameritech Operating Companies (Ameritech)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

California Payphone Association (CPA)

Capital Network System, Inc. (CNS)

Central Telephone Company (Centel)

Cincinnati Bell Telephone (CBT)

Competitive Telecommunications Association (CompTel)

Consolidated Communications Operator Services, Inc. and Illinois Consolidated Telephone Company, Consolidated Network, Inc., Consolidated Communications Public Services (CCS)

GTE Service Corporation and affiliated domestic GTE telephone operating companies (GTOC)

Integretel, Inc. (Integretel)

Intellicall, Inc. (Intellicall)

Mastercard International Incorporated and VISA U.S.A., Inc., California Bankers Clearing House Association, The New York Clearing House Association (Mastercard)

MCI Telecommunications Corporation (MCI)

National Exchange Carrier Association (NECA)

National Telephone Cooperative Association (NTCA)

Nycom Information Services, Inc. (Nycom)

NYNEX Telephone Companies (NYNEX)

Pacific Bell and Nevada Bell Companies (Pactel)

Rochester Telephone Corporation (Rochester)

Southwestern Bell Telephone Company (SWB)

US West Communications, Inc. (US West)

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 69--ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.4 is amended by adding paragraph (b)(8) to read as follows:

§ 69.4 Charges to be filed.

* * * * *

(b) * * *

(8) Line information database

* * * * *

3. Section 69.120 is added to read as follows:

§ 69.120 Line information database.

a) A charge that is expressed in dollars and cents per query shall be assessed upon all carriers that access validation information from a local exchange carrier database to recover the costs of:

(1) the transmission facilities between the local exchange carrier's signalling transfer point and the database; and

(2) the signalling transfer point facilities dedicated to the termination of the transmission facilities connecting the database to the exchange carrier's signalling network.

b) A charge that is expressed in dollars and cents per query shall be assessed upon all carriers that access validation information from a local exchange carrier line information database to recover the costs of the database.

4. Section 69.305 is amended by redesignating paragraph (c) as paragraph (d) and revising it, and adding a new paragraph (c) to read as follows:

§ 69.305 Carrier cable and wire facilities (C&WF)

* * * * *

(c) Carrier C&WF that is used to provide transmission between the local exchange carrier's signalling transfer point and the database shall be assigned to the Line Information Database sub-element at 69.120(a).

(d) All Carrier C&WF that is not apportioned pursuant to paragraphs (a), (b), and (c) of this section shall be assigned to the Special Access element.

5. Section 69.306 is amended by revising paragraph (c) to read as follows:

§ 69.306 Central office equipment (COE)

* * * * *

(c) COE Category 2 (Tandem Switching Equipment) that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Co.* shall be assigned to the Common Transport Element. COE Category 2 which is used to provide transmission facilities between the local exchange carrier's signalling transfer point and the database shall be assigned to the Line Information Database subelement at Section 69.120(a). All other COE Category 2 shall be assigned to the interexchange category.

6. Section 69.307 is amended by designating the existing paragraph as paragraph (b) and revising it, and adding a new paragraph (a) to read as follows:

§ 69.307 General support facilities

(a) General purpose computer investment used in the provision of the Line Information Database sub-element at Section 69.120(b) shall be assigned to that sub-element.

(b) All other General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Limited Pay Telephone, Local Switching, Information, Dedicated Transport, Common Transport, and Special Access elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities excluding Category 1.3, combined.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station KNKM900
Mobilecomm Nationwide Messaging, Inc.
Churchville, MD

NAL/Acct. No.: 215HF0002

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 8, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Mobilecomm Nationwide Messaging, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Mobilecomm Nationwide Messaging, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mobilecomm Nationwide Messaging, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mobilecomm Nationwide Messaging, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0002" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0002
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Mobilecomm Nationwide Messaging, Inc., 1800 E. Countyline Rd., Suite 300, Ridgeland, MS, 39157.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station KNKG619
Metromedia Paging Services, Inc.
Churchville, MD

NAL/Acct. No.: 215HF0003

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 8, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Metromedia Paging Services, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Metromedia Paging Services, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio,* 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD,* 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont,* 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on recon.,* FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Metromedia Paging Services, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Metromedia Paging Services, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0003" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0003
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Metromedia Paging Services, Inc., 1667 K Street, NW, Washington, DC, 20006-1661.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station WNFS897
Schumacher & Seiler Inc.
Churchville, MD

NAL/Acct. No.: 215HF0004

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 8, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Schumacher & Seiler, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Schumacher & Seiler, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio,* 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD,* 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont,* 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on recon.,* FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Schumacher & Seiler, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Schumacher & Seiler, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0004" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0004
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Schumacher & Seiler, Inc., 9044 Frederick Rd., Ellicott City, MD, 21043.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-92-114

Application for Certificate of Public Convenience and Necessity to Provide International Message Telecommunications Service Between Puerto Rico and Chile on a Direct Facilities Basis

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international message telecommunications service on a direct facilities basis between Puerto Rico and Chile by Telefonica Larga Distancia de Puerto Rico (TLD).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-114 IS GRANTED, and TLD is authorized to:

a. lease form Comsat and operate eight circuits between its Humacao, Puerto Rico earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Chile furnished by ENTEL, TLD's correspondent in Chile.

b. use said facilities to provide TLD's international message telecommunications service between Puerto Rico and Chile.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall continue to maintain a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRANS NATIONAL COMMUNICATIONS, INC. d/b/a MEMBERS' LONG DISTANCE ADVANTAGE — File No. I-T-C-92-109

Application for authority to operate as an international resale carrier.

KINETIC INTERNATIONAL COMMUNICATIONS, INC. d/b/a THRIFTYCALL WORLDWIDE COMMUNICATIONS — File No. I-T-C-92-110

Application for authority to operate as an international resale carrier.

ADTEL COMMUNICATIONS, INC. — File No. I-T-C-92-120

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Trans National Communications, Inc. (TNC), Kinetic International Communications, Inc. (KIC), and Adtel Communications, Inc. (ACI).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-109, I-T-C-92-110, and I-T-C-92-120 ARE GRANTED, and

a. TNC and KIC are authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs;

b. ACI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in Intellicall Operator Services, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOTEL, INC. File No. I-T-C-92-119

Application for authority to operate
as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. On March 4, 1992, NOTEL, Inc. (NOTEL) filed the above-captioned application pursuant to Section 214 of the Communications Act, for authority to provide maritime mobile satellite services, including voice, data, facsimile and telex services, by reselling the services of IDB Aero-Nautical Communications, Inc. Further, NOTEL proposes to offer the service to all points in the Atlantic, Pacific, and Indian Ocean regions. The application is uncontested.

2. Upon consideration of this application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of maritime mobile satellite services to the general public by NOTEL.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-92-119 IS GRANTED and NOTEL is authorized to provide maritime mobile satellite service by the resale of the maritime mobile satellite service set forth in IDB Aero-Nautical's Tariff F.C.C. No. 1 between the U.S. and the Atlantic, Pacific, and Indian Ocean regions.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECOMMUNICATIONS CORP. File No. I-T-C-92-112

Application for authority to acquire and operate facilities for service between the U.S. and Chile.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Chile by International Telecommunications Corporation (ITC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-112 IS GRANTED, and ITC is authorized to:

a. lease from Comsat and operate 16 64-kbps circuits between the Washington International Teleport (Alexandria, VA) earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Chile furnished by ITC's correspondent in Chile;

b. lease and operate 16 64-kbps circuits in the Alexandria earth station to be used in conjunction with the satellite space segment;

c. lease and operate 16 64-kbps connecting circuits between the Alexandria earth station and ITC's operating center in New York City, New York; and

d. use said facilities to provide International Digital Route (IDR) services between the U.S. and Chile.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between ITC and its correspondent in Chile, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-113

Application for authority to acquire and operate facilities for direct service between the U.S. and Ghana, Romania and Yugoslavia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Ghana, Romania and Yugoslavia by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-113 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 30 voice-grade satellite circuits between the Mt. Jackson, Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Ghana furnished by MCI's correspondent in Ghana (Gahana Posts and Telecommunications Corp);

b. own and operate 30 voice-grade circuits in the Mt. Jackson earth station to be used in conjuction with the space segment capacity;

c. own and operate 30 voice-grade circuits between the Mt. Jackson earth station and MCI's West Orange, New Jersey operating center;

d. use the facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Ghana;

e. lease from Comsat and operate 30 voice-grade satellite circuits between the Washington International Teleport (Alexandria, Virginia) earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Romania furnished by MCI's correspondent in Romania (Rom Telecom);

f. lease from Midland and operate 30 voice-grade circuits in the Alexandria earth station to be used in conjunction with the satellite space segment;

g. lease and operate 30 voice-grade circuits between the Alexandria earth station and MCI's West Orange, New Jersey operating center;

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and Romania;

i. lease from Comsat and operate 55 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Yugoslavia furnished by MCI's correspondent in Yugoslavia (Yugoslavia Community of Yugoslav PTT's (Zajednica JPTT));

j. own and operate 55 voice-grade circuits in the Andover earth station to be used in conjunction with the satellite space segment;

k. own and operate 55 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

l. use facilities in i, j and k to provide MCI's regularly authorized services between the U.S. and Yugoslavia.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Ghana, Romania and Yugoslavia, and a copy of the agreements shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-146

Application for authority to lease and operate facilities for direct service between the U.S. and Uganda.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Uganda by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-146 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate four (4) voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Uganda furnished by MCI's correspondent in Uganda;

b. lease from AT&T and operate four (4) voice-grade circuits in the Etam earth station to be used in conjunction with the satellite space segment;

c. lease and operate four (4) voice-grade connecting circuits between the Etam earth station and MCI's West Orange, New Jersey, operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and Uganda.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Uganda, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDWEST COMMUNICATIONS, INC.	File Nos. ITC-92-094-AL CSG-92-047-AL
MIDWEST CABLE & SATELLITE, INC.	File Nos. ITC-92-095-AL CSG-92-048-AL

Applications for Authority Under Sections 214 and 310 of the Communications Act to Assign Title II and III Authorizations

MEMORANDUM, OPINION, AND ORDER

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. The Commission has before it for consideration parallel applications filed by Midwest Communications, Inc. (Midwest) and Midwest Cable & Satellite, Inc. (Midwest Cable) requesting authority for the *pro forma* assignment of Transborder Satellite Authorization File No. ITC-92-026/1474-DSE-P/L-91 from Midwest Cable to its grandparent corporation, Midwest (File No. ITC-92-095-AL), and for the subsequent assignment of the subject Transborder Satellite Authorization from Midwest to CBS, Inc. (File No. ITC-92-094-AL). The applications involve Midwest Cable's Fixed Satellite Transmit/Receive Earth Station E910483 at Lino Lakes, Minnesota. Midwest's applications were placed on public notice on February 12, 1992, and no comments were received.

2. Midwest Cable operates both as a domestic and international nondominant common carrier offering various television programming distribution and reception services, video conferencing, and occasional use video services.[1] Midwest Cable is wholly-owned and controlled by Midwest Communications Operating Company, which in turn is wholly-owned and controlled by Midwest. CBS, Inc., a U.S. corporation, owns numerous radio and television stations and radio and television networks, as well as being engaged, through its CBS Enterprises Division, in the worldwide sale and distribution of news and public affairs broadcasts, sports and entertainment programming and feature films to broadcast and other media.

3. The stated purpose of these applications is to effectuate the terms of the Agreement and Plan of Reorganization entered into between Midwest and CBS on July 23, 1991. Under the terms of that Agreement, Midwest proposes to assign the Lino Lakes earth station and accompanying authorization to CBS. In order to do so, Midwest first has to obtain Commission consent to the *pro forma* assignment of the station from its second-tier subsidiary, Midwest Cable. The consummation of the *pro forma* assignment and the subsequent assignment from Midwest to CBS is to occur at a unitary Closing.

4. Midwest and Midwest Cable also state that they already filed applications (1897-DSE-AL-91(2) and 1896-DSE-AL-91(2) respectively) to assign Earth Station E910483 from Midwest Cable to Midwest, and then from Midwest to CBS, Inc. They state these applications were granted September 13, 1991 and no further authorization is needed for their assignment. However, in reviewing these applications we find that the Satellite Radio Branch of the Common Carrier Bureau only authorized these transactions with respect to the domestic use of the facilities. Instead of requiring Midwest and Midwest Cable to file new applications for the assignment of the international authorization of Station E910483, we will assign the additional following file numbers (CSG-92-047-AL for Midwest and CSG-92-048-AL for Midwest Cable) to their previous applications, and consider their grant with this application.[2]

5. In view of the foregoing, we conclude that the assignment of the Section 214 authorization (File No. ITC-92-026) to provide transborder services via U.S. domestic, Canadian and Mexican satellites from Midwest Cable to Midwest, and from Midwest to CBS will serve the public interest. Further, we find the public interest will be served by assignment of the Title III international satellite earth station authorization (E910483) from Midwest Cable to Midwest, and from Midwest to CBS.

6. Accordingly, IT IS ORDERED that the applications of Midwest Cable & Satellite, Inc. (File Nos. ITC-92-095-AL and CSG-92-048-AL) and Midwest Communications, Inc. (File Nos. ITC-92-094-AL and CSG-92-047-AL), which request Commission consent to the assignment of the Section 214 authorization originally granted in File No. ITC-92-026, and the Title III international satellite earth station authorization (E910483), from Midwest Cable & Satellite, Inc. to Midwest Communications, Inc., and from Midwest Communications, Inc. to CBS, Inc., ARE GRANTED.

7. IT IS FURTHER ORDERED that CBS, Inc. must file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Midwest Cable & Satellite, Inc., 7 FCC Rcd 151 (1992).

[2] Midwest and Midwest Cable only paid filing fees to cover the assignment of the domestic authorizations for Station E910483. Therefore both companies will be billed additionally for the assignment of the international authorizations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. I-T-C-92-090

Application for authority to resell the services of other common carriers to provide switched voice service to specific international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 29, 1992; Released: June 8, 1992

By the Chief, International Facilities Division:

1. The captioned application, filed January 30, 1992, by Cable and Wireless Communications, Inc. (C&W), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1 and 2 for the provision of international switched voice service between the United States and nine international points listed in Appendix A. The application was placed on public notice on February 5, 1992. No comments were received.

2. C&W is a common carrier authorized to provide switched voice services on a resale basis to numerous international points. C&W is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As such, C&W is a foreign-owned carrier as defined in the Commission's *International Competitive Carrier* decision, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of all international common carrier services between the United States and international points.

3. As a dominant carrier in its provision of international common carrier services, C&W remains subject to traditional entry and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorization must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorization, or, as here, serve additional points set forth in the underlying carriers' tariffs but not specified in the reseller's existing Section 214 authorizations.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by C&W between the United States and the points listed in Appendix A to this decision.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-090 IS GRANTED, and C&W is authorized to provide international switched voice by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. No. 1 and 2 between the U.S. and the points listed in Appendix A.

6. IT IS FURTHER ORDERED that the applicant shall file copies of any necessary operating agreements entered into by itself or its parent/affiliate with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries C&W is authorized to serve within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Burundi
Central African Republic
Chad
Comoros
Equatorial Guinea
Falkland Islands
Madagascar
Palau
St. Helena

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station KPA492
Mobilecomm of Virginia, Inc.
Churchville, MD

NAL/Acct. No.: 215HF0005

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 9, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Mobilecomm of Virginia, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Mobilecomm of Virginia, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio,* 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD,* 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont,* 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on recon.,* FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Mobilecomm of Virginia, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Mobilecomm of Virginia, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0005" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0005
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Mobilecomm of Virginia, Inc., 1800 E. Countyline Rd., Suite 300, Ridgeland, MS, 39157.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station WNDF721
Lin Mar Development Corp.
Churchville, MD

NAL/Acct. No.: 215HF0006

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; Released: June 9, 1992

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Lin Mar Development Corp. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Lin Mar Development Corp., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Lin Mar Development Corp. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Lin Mar Development Corp. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0006" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0006
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Lin Mar Development Corp., 2415 Baldwin Mill Rd., PO Box 207, Fallston, MD, 21047.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station WNGC569
S & K Heating & Air Conditioning
Churchville, MD

NAL/Acct. No.: 215HF0007

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 9, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to S & K Heating & Air Conditioning for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. S & K Heating & Air Conditioning, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio,* 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD,* 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont,* 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *modified in part on recon.,* FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that S & K Heating & Air Conditioning is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that S & K Heating & Air Conditioning shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0007" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0007
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to S & K Heating & Air Conditioning, Bouzarth Ln., Aberdeen, MD, 21001.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station WNPN664
Fireside Tom Forest Products Co.
Churchville, MD

NAL/Acct. No.: 215HF0008

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; **Released: June 9, 1992**

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Fireside Tom Forest Products Co. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Fireside Tom Forest Products Co., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Fireside Tom Forest Products Co. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Fireside Tom Forest Products Co. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0008" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0008
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Fireside Tom Forest Products Co., 5710 Williams Rd., Hydes, MD, 21802.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station KNKE387 Paging Network of Washington, Inc. Churchville, MD — NAL/Acct. No.: 215HF0009

NOTICE OF APPARENT LIABILITY

Adopted: May 27, 1992; Released: June 9, 1992

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Paging Network of Washington, Inc. for willful and repeated violations of the Commission's rules relating to the painting of radio antenna towers (47 C.F.R. Section 17.50), the lighting of radio antenna towers (47 C.F.R. Section 17.26), and notification to the FAA if tower lights malfunction (47 C.F.R. Section 17.48(a)). *See also* 47 C.F.R. Section 17.47(a)(1).

2. The appropriate amount of forfeiture for this violation is $8,000.

II. BACKGROUND

3. The Commission's Baltimore, Maryland, Office inspected a radio antenna structure located near Churchville, Maryland, 2.3 miles south of Route 22, at latitude N-39-31-48, longitude W-076-15-29, on September 9 and 10, 1991.

4. The inspection disclosed that the top beacon was not operating. Also, the paint on the tower was badly faded and peeling so that there were almost no contrasting colors. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the light was extinguished.

III. DISCUSSION

5. Section 303(q) of the Communication Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.26 of the Commission's rules governs the lighting of the tower at issue. 47 C.F.R. Section 17.26. Section 17.47(a)(1), moreover, requires Commission licensees to observe antenna towers on which they are licensed every 24 hours to ensure that the lights are functioning properly. 47 C.F.R. Section 17.47(a)(1). If lights malfunction, licensees are required to notify the FAA. 47 C.F.R. Section 17.48(a). Furthermore, licensees are required to paint towers to maintain good visibility. 47 C.F.R. Sections 17.23 and 17.50. Paging Network of Washington, Inc., therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the painting of towers and FAA notification regarding malfunctioning lights.

6. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower. *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n.3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

7. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, adopted May 14, 1992, the base forfeiture amount for failure by a licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Paging Network of Washington, Inc. is apparently liable for a monetary forfeiture penalty in the amount of $8,000 for willful and repeated violations of the above rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Paging Network of Washington, Inc. shall, within thirty (30) days of the release of this notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Place "NAL/Acct. No.: 215HF0009" on your remittance and mail to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Send written responses why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No.: 215HF0009
Room 744
1919 M Street, NW
Washington, DC 20554

10. It is further ordered that a copy of this Notice of Apparent Liability for a Monetary Forfeiture shall be sent by certified mail, return receipt requested, to Paging Network of Washington, Inc., 4965 Preston Park Blvd., Suite 500, Plano, TX, 75093.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Stoner Broadcasting System, Inc.

Licensee of Radio Station
WMXZ(FM), New Orleans, LA

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) an $8,750 Notice of Apparent Liability (NAL) issued January 15, 1992, to Stoner Broadcasting System, Inc., licensee of Radio Station WMXZ(FM), New Orleans, Louisiana; and (2) the licensee's February 13, 1992, response to the NAL, asking that the forfeiture be reduced.

2. The NAL was issued, in part, for apparent violations of Section 73.1216 of the Commission's rules, which requires that broadcast announcements concerning licensee-conducted contests shall not contain false, misleading or deceptive information about their material terms. Some of the station's "$100,000 People's Choice Contest" broadcast promotions, which began July 16, 1990, appeared to indicate that $100,000 worth of automobiles would be given away as prizes, when in fact the prize was one car worth substantially less than that amount. The NAL also cited the station for apparent violations of Section 73.1201 of the Commission's rules, which requires station identification at the top of the hour by use of the station's official call letters. On August 13-15, 1990, the station was monitored and found to have used its unofficial promotional identification in lieu of its official station identification.

3. The licensee urges that the forfeiture amount be reduced to reflect the minor and inadvertent nature of the violations. Stoner argues that the allegedly misleading statement[1] was broadcast only during the first few days of the contest; that WMXZ deleted the statement from its promotional announcements immediately after receiving the listener complaint of July 17, 1990 (the same complaint that later prompted our investigation); that the statement was not misleading in context of the full announcement, which made clear the true nature and value of the prize; that the written rules, posted at the station and at all participating automobile dealerships, were straightforward and complete; and that the contest was conducted in strict accordance with the rules. As for the station identification infractions, the licensee asks that we consider how infrequently they occurred in its otherwise spotless record before the Commission.[2]

4. In issuing the NAL, we rejected Stoner's argument that the contest promotion was misleading only if particular statements were taken out of context. We considered the relatively minor nature of the violation (the contest announcements were misleading for only the first few days of the contest, which extended from July 16 to September 8, 1990) and the station's prompt corrective action prior to Commission involvement, to conclude that only the base amount, with no upward adjustment for repetition, was warranted in this case. Accordingly, we assessed the base forfeiture amount of $6,250, as listed in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*, applicable to violations of Section 73.1216 of our rules. Similarly, in considering the forfeiture amount for violations of Section 73.1201, we found that the incorrect station identifications were repeated sufficiently to warrant assessment of the *Policy Statement* base amount of $2,500, but not often enough to warrant upward adjustment for their repetition.

5. Section 503(b)(2)(D) of the Communications Act requires the Commission to determine the amount of a forfeiture penalty by considering, among other things, the violator's "history of prior offenses," reflected in our *Policy Statement, supra*, as a factor that may affect upward or downward adjustment. Our review of the relevant compliance history -- not limited to the station which is the subject of the forfeiture but including all the stations that the licensee operates -- confirms that Stoner's record of overall compliance is a good one. Taking this into account, we are persuaded that the total forfeiture of $8,750 warrants a 20% reduction.

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Stoner Broadcasting System, Inc., licensee of Radio Station WMXZ(FM), New Orleans, LA, FORFEIT to the United States the sum of seven thousand dollars ($7,000) for repeated violations of Sections 73.1216 and 73.1201 of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] "We have gone out to get over $100,000 worth of cars to give away."

[2] Other than the issues raised here, we have no records or indications of rules violations by WMXZ(FM) since Stoner began operating the station early in April 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, et al.,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.,	File No. E-89-385
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390
GTE NORTH, INC.,	File No. E-89-391
GTE SOUTH, INC.,	File No. E-89-392
GTE SOUTHWEST, INC.,	File No. E-89-393
CENTRAL TELEPHONE COMPANY, and	File No. E-89-395
THE CONTINENTAL TELEPHONE COMPANIES,	File No. E-89-396

Defendants.

ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Competitive Telecommunications Association and the interexchange carrier member companies (CompTel), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that CompTel presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the

[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does CompTel in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, DA 92-553 (Com.Car.Bur. released May 11, 1992).

issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. CompTel's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] CompTel has asked the Commission to direct defendants to provide such computations.

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Some defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which CompTel may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with CompTel, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that CompTel's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding CompTel's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute CompTel's claim that the damage it suffered should be

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[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] CompTel also seeks interest on this amount. We note that certain defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to CompTel's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, the U S West companies contend that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[12] *See, e.g.*, Motion to Dismiss of The Chesapeake and Potomac Telephone Companies and New Jersey Bell Telephone Company at 3 (filed November 6, 1989).

measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY, and — File No. E-89-420
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, — File No. E-89-421
Defendants.

ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Com Systems, Inc. (CSI), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that CSI presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. CSI's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return pre-

[1] Mountain States Telephone and Telegraph Company consolidated with its affiliated local exchange carriers into US West Communications, Inc. *See* 5 FCC Rcd 1982 (1990). The subject complaint, however, was filed prior to the consolidation. Accordingly, we shall refer to the carrier as named in the complaint.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does CSI in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

scription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] CSI has asked the Commission to direct defendants to provide such computations.

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the MCI and AT&T Liability Orders.[9] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants also contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which CSI may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with CSI, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that CSI's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding CSI's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute CSI's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[13]

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[8] CSI also seeks interest on this amount as well as such other relief as may be appropriate. We note that defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to CSI's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, Mountain States contends that the relevant overall interstate rate of return is that of US West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[12] *See* Answer of Pacific Bell at 7 (filed November 22, 1989); Answer, Affirmative Defenses and Motion to Dismiss of The Mountain States Telephone and Telegraph Company at 7 (filed November 27, 1989).

[13] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY, Complainant,	
v.	
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-401
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-402
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY, Defendants.	File No. E-89-408

ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, MidAmerican Long Distance Company (MidAmerican), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that MidAmerican presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does MidAmerican in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. MidAmerican's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. The defendants also contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which MidAmerican may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with MidAmerican, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that MidAmerican's share, of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding MidAmerican's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute MidAmerican's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will

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[8] MidAmerican also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to MidAmerican's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, the US West companies contend that the relevant overall interstate rate of return is that of US West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[12]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[12] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS LIMITED PARTNERSHIP,
Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-368
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-369
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-370
PACIFIC BELL TELEPHONE COMPANY, and	File No. E-89-378
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	File No. E-89-380

Defendants.

ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, US Sprint Communications Limited Partnership (Sprint), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986.

II. BACKGROUND

2. The case that Sprint presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damage claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, were filed prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, Case Nos. 90-9510, *et al.*, Order and Judgment (10th Cir. Dec. 13, 1991) (per curiam).

[4] The complainants relied, as does Sprint in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the ommission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985, DA 92-554 (Com.Car.Bur. released May 11, 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, DA 92-553 (Com.Car.Bur. released May 11, 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Sprint's damage claims rest primarily on the contention that the proper measure of the damage it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period October 1, 1985 through December 31, 1986, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8] Sprint has asked the Commission to direct defendants to provide such computations.

5. The defendants raise a number of challenges to the complainant's damage claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] The defendants argue in unison that any damage awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC* [10] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rate of return was below the authorized level.[11] Several of the defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories.[12] Some defendants also contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[13]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Sprint may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Sprint, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damage determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damage claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that Sprint's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding Sprint's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute Sprint's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant

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2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Sprint also seeks interest on this amount. We note that Pacific Bell Telephone Company argues that the Commission has no authority to award prejudgment interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to Sprint's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] Additionally, the U S West companies contend that the relevant overall interstate rate of return is that of U S West in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990).

[12] *See, e.g.*, Southern New England Telephone Company Memorandum in Support of SNET's Answer and Motion to Dismiss at 3-4 (filed November 2, 1989).

[13] *Id.* at 6.

actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 29, 1992

Released: June 2, 1992

Mr. Dalton Moore
Dalton Media Studios
1930 North Echo
Fresno, CA 93704

Dear Mr. Moore:

This is in response to your request for guidance as to the format of sponsorship identifications for television political advertisements. You assert that, because of recent changes in the Commission's rules pertaining to sponsorship identifications, there is confusion among producers of political advertisements and broadcast stations. You request prompt handling of your request in light of the upcoming June 2, 1992, California primary election.

On February 12, 1992, the Commission revised its rules concerning sponsorship identification requirements applicable to political broadcasting advertisements. *Memorandum Opinion and Order, Codification of the Commission's Political Programming Policies,* 7 FCC Rcd 1616 (1992) (*"Memorandum Opinion and Order"*). With respect to televised advertisements, the Commission now requires a video-only identification of the sponsor with letters "equal to or greater than four percent of the vertical picture height, and airing for not less than four seconds."

Your specific questions, with associated answers, are set forth below seriatim.

Question: Can we abbreviate "Paid" using "Pd."?

Answer: Section 73.1212(a)(1) of the Commission's rules specifically requires that a sponsorship identification state that broadcast matter is "sponsored, paid for, or furnished." The rules do not allow for abbreviation of these terms; thus the word "paid" should not be abbreviated.

Question: Is it mandatory to include certain words such as "The" and "Committee?"

Answer: Section 73.1212 provides that the sponsorship identification shall:

> [F]ully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished.

Thus, if the name of the entity that has paid for the advertisement includes the word "committee," this word would have to be included in the sponsorship identification. This rule requires that the sponsorship identification must identify *with specificity* the committee, particular sponsoring group, person, corporation, or other entity sponsoring the advertisement. *See Station KOOL-TV,* 26 FCC 2d 42 (1970). In that case, the Commission determined that "Paid for by A Lot of People Who Want to See Sam Grossman Elected to the United States Senate" lacked sufficient specificity to comply with the sponsorship identification requirements because it was not clear that the name listed was in fact a committee.

Question: Exactly how tall should the sponsorship identification be, and must all letters equal the minimum size (as in all caps) or does minimum size refer to the size of the type font (*i.e.*, 20 video lines)?

Answer: All of the letters in the sponsorship identification must meet the "four percent of the vertical picture height" standard. As to what constitutes four percent, the Commission stated in the *Memorandum Opinion and Order* that "any reasonable basis for determining the size and timing used by broadcasters to comply with the objective criteria outlined above will be treated deferentially by the Commission." The most suitable method for calculating four percent of the vertical picture height is the use of the number of scan lines in a television signal -- 525. Of these, 483 consist of picture content, and four percent of 483 is 19.32. Thus, 20 scan lines would constitute four percent.

Question: Which type style is required... serif? sans-serif? Is there a mandatory color for type? Does type need a darker outline border? If so, what color should the border be, and how thick? How thick should the letters be? Book? Light? Medium? Demi? Bold? Extra Bold? Black? How condensed can we make the type? Can we supercondense long committee names onto one line?

Answer: The Commission has established no specific standards with respect to any of these criteria. The *Memorandum Opinion and Order* stated that:

> [I]f factors other than size or air time prevent the fact of sponsorship and identity of the sponsor from being conveyed to viewers, such as lack of picture contrast or inclusion of significant distractions, a violation of Section 317 conceivably could be found despite "technical" compliance with these requirements.

A reasonableness standard would be used in evaluating compliance with the Act and the Commission's rules.

Question: Exactly where on the screen must we place the disclaimer? Can the disclaimer appear at any time during the spot? Must it appear at the open? At the close? When?

Answer: Section 73.1212 provides that, for broadcasts of five minutes' duration or less, one sponsorship identification announcement must appear either at the *beginning or conclusion* of the broadcast. For paid political advertisements longer than five minutes, a sponsorship identification must appear at the beginning *and* conclusion of such broadcast.

We trust that the above information adequately addresses your concerns.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commis-

sion, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1992

Common Carrier Bureau

CLARIFICATION OF INTERIM OUTAGE REPORTING

In Report and Order in CC Docket No. 91-273, 7 FCC Rcd 2010 (1992), the Commission required certain common carriers to report service outages lasting more than 30 minutes if they potentially affected 50,000 or more customers. Initial reports must be filed electronically within 90 minutes of the onset of the outage. Complete, final reports are due 30 days later. Questions have been raised about several provisions of the reporting requirement, including whether network congestion is an outage and how to measure the number of customers potentially affected. Additionally, petitions for reconsideration of certain aspects of the rule have been filed.

To facilitate the reporting of outages, until final disposition of these matters, carriers should observe the following guidelines:

-- The term outages includes both loss of dial tone and significant congestion that results in dial tone delay. Significant congestion is characterized by 85% dial tone delay over 3 seconds for 30 or more continuous minutes.

-- When the outage is located in an end office, "potentially affects 50,000" means that there are 50,000 subscriber lines in that end office.

-- When the outage is located in a tandem or facility, the carrier will make a good faith effort to determine whether 50,000 customers were potentially affected for 30 minutes.

-- When the outage is a signalling failure, "potentially affects 50,000" means that a mated pair of STPs or SCPs has failed or there is failure of one STP in the mated pair and failure of the A links to the other STP in the mated pair, causing loss of signalling for an end office with more than 50,000 lines, unless the carrier has double mated pairs in its signalling system such that the outage does not affect its network." Potentially affects 50,000" may also mean that all A links to a mated pair have been lost, causing loss of signalling for an end office with more than 50,000 lines, unless the carrier has double mated pairs in its signalling system such that the outage does not affect its network.

On April 29, the Network Reliability Council, a Federal Advisory Committee established to provide expert advice on ways to improve the reliability of the nation's telecommunications networks, agreed to expand significantly the kind of outage incidents reported to the FCC, for six months beginning June 1, 1992. Carriers agreed to report outages of certain "special" facilities within 90 minutes, regardless of the number of customers affected, and to report outages affecting 30,000 to 50,000 customers within 30 days.

To facilitate the reporting of these outages, carriers should observe the following guidelines:

-- Outages affecting a "special" facility, defined as a major military installation, a key government facility, a nuclear power plant or a 911 tandem, all as defined by the reporting carrier, or a "large" or "medium" commercial service airport, as defined and listed in the "National Plan of Integrated Airport Systems," should be reported in an Initial Service Disruption Report regardless of the number of lines affected. These reports should be presented to the FCC within 90 minutes of the carrier's knowledge that an outage has affected a "special" facility. Any request for confidentiality will be considered pursuant to Sections 0.457 and 0.459 of the Commission's Rules. Reports should provide all the information required of Initial Service Disruption Reports as specified in Section 63.100 of the Rules. Not later than 30 days after the "special" facility outage, the carrier should file a Final Service Disruption Report as provided in Section 63.100. To determine whether airports in the service area are classified as "large" or "medium," under the National Plan of Integrated Airport Systems, carriers are advised to contact Gene Mercer, APO 110, FAA, 800 Independence Ave., S.W. 20591, phone 202/267-3355.

-- Reports of outages continuing 30 minutes or more and potentially affecting 30,000 to 50,000 of the reporting carrier's customers should be made according to the criteria established in Section 63.100 of the Rules and the criteria outlined above, except that the phrase "30,000 to 50,000" is to replace the number "50,000". Initial Service Disruption Reports should not be filed for outages affecting less than 50,000 customers, unless they concern "special" facilities. Final Service Disruption Reports need to be filed for outages affecting 30,000 to 50,000 customers, for outages affecting special facilities and, of course, for outages affecting 50,000 or more customers. Any request for confidentially will be considered pursuant to Sections 0.457 and 0.459 of the Commission's Rules.

For further information contact Robert Kimball at (202)634-4215 or James Keegan at (202)634-1860.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 31, 1992

ADJUSTMENTS TO PRICE CAP CARRIERS' SERVICE QUALITY AND INFRASTRUCTURE REPORTS IN ARMIS

On May 17, 1991, the Common Carrier Bureau released its Memorandum Opinion and Order in CC Docket No. 87-313 establishing specific service quality and infrastructure reporting requirements for local exchange carriers (LECs) subject to price cap regulation. 6 FCC Rcd 2974 (Com.Car.Bur. 1991) (*Service Quality Order*). In that Order, we stated that it was our intent that consideration of reporting requirements would continue.

Having carefully reviewed the initial submissions of data and information in response to our reporting requirements, we have determined that some modifications to the Reports are needed. These modifications, described below, are to be effective beginning with the June 30, 1992, filing.

1. Installation Intervals

Attachment B of the *Service Quality Order* directed LECs to file their installation intervals with the Tariff Division. To centralize reporting and analysis functions, we have now determined that the installation interval file will be maintained in the Accounting and Audits Division, where hard and diskette copies of the reports are filed. Accordingly, carriers proposing installation interval changes should file these changes with the Accounting and Audits Division, not the Tariff Division, effective immediately.[1]

Attachment B also imposed a 30-day waiting period on installation interval changes, when it stated: Should a LEC change any [installation] intervals, that LEC will file the new intervals, with an explanatory cover letter, no less than 30 days before the effectiveness of the change. 6 FCC Rcd at 3000. We have determined that, effective immediately, filings that decrease installation intervals should be allowed to be effective when filed, without a 30-day waiting period.

2. Roll-ups of reports

We have discussed informally with the carriers their filing all reports in a more aggregated, "rolled up" form, in addition to on a study area level. They have agreed to do so, and some carriers filed their December 31 reports with roll-ups. Beginning with the June 30, 1992 filings, all three ARMIS reports in this program should include roll-ups. We believe this approach creates minimal burden for the carriers, and will reduce Commission staff burden and allow more ready access to these publicly available filings. OMB approval of this modification is being requested.

3. Multiple reports per diskette

The *Service Quality Order* required that carriers file all reports on a study area basis, in both hard copy and diskette. Most carriers have taken this to mean that each study area report must be filed on a separate diskette, but we find this practice unnecessary and wasteful. Accordingly, we notify the carriers that they may file the reports of multiple study areas on a single diskette if they so desire. The three reports -- 43.05, 43.06, and 43.07 -- should not, however, be combined.

4. Switch Downtime Reports

LECs currently file reports on switch downtime in Table IV and Table IVa of Report 43.05, identifying downtime as "scheduled" or "unscheduled." Lack of typographic uniformity in these two classifications has caused difficulty in using the database. Further, we have concluded it will be helpful and not burdensome to expand the usefulness of these reports by further characterizing each unscheduled downtime exceeding 2 minutes' duration. The following categories have been developed by Commission staff through discussions with industry and review of technical publications. LECs should use the two-digit code for each downtime cause to populate column t.

Classifications of Switch Downtime

01 -- scheduled - includes outages, restarts, phases, etc. resulting from scheduled or planned maintenance, installation, or manual initializations. This includes such activities as parameter loads, software/firmware changes, and other OA&M activities.

02 -- procedural errors - telco - installation or maintenance related

03 -- procedural errors - telco - non installation or maintenance related (deviation from established procedures, or human error within established procedures; includes failure to respond)

04 -- procedural errors - system vendors

includes errors in documentation/instruction

05 -- procedural errors - other vendors

e.g., contractor, independent installation vendor

06 -- software design

faulty or ineffective design, including faulty patches or software overrides provided by vendor

[1] There has apparently been some confusion as to the frequency with which installation intervals must be filed. Interval reports must be filed only if intervals are changing; they need not be included, for example, with quarterly report filings.

07 -- hardware design design deficiency or error. Does not include Product Change Notice (PCN) inappropriately delayed by vendor (= procedural error vendor) or telco (= procedural error telco), or PCN waived by telco (= procedural error telco)

08 -- hardware failure

random hardware failure not related to design but due to inherent unreliability of system components

09 -- acts of God

weather, natural disaster (including lightning, but not if lightning's effect due to bonding or grounding violations; then = procedural error vendor or telco)

10 -- traffic overload

traffic load exceeds engineered capacity of system due to unforeseen external condition; not if due to system trouble, inadequate engineering, inadequate network management, system design deficiency

11 -- environmental

contamination, leaks, temperature, etc.

12 -- external power failure

use of this classification is rare because of existence of battery and other backup systems; does not include failures of converters, inverters internal to telco

13 -- massive line outage cable cut, other

14 -- remote

loss of facilities between host and remote (if due to activities internal to host or remote; if external, assign other cause as appropriate --*e.g.*, cable dig-up = procedural telco or procedural other vendor)

15 -- other/unknown must be footnoted; if unknown, so state

Thus, a carrier noting an unscheduled outage due to an external power failure would report simply "12." Footnotes may be used, as before, to give further details.

5. Data corrections

Commission staff and various users of the monitoring program data have experienced uncertainty regarding the reliability of some data at any given point in time. In view of multiple corrective filings by some carriers. We have accordingly determined to establish some guidelines for such filings, effective immediately, as follows:

a. Each corrective filing must be clearly labeled as to its place in the series. In the upper right corner is a submission number, and this number must be filled in, with successive submissions numbered serially. All corrective filings must be filed, as initial filings are, in both paper and diskette, with the Accounting and Audits Division, the Industry Analysis Division, and Downtown Copy Center.

b. Carriers filing reports in ARMIS are under a legal obligation to ensure that the reports are accurate and complete; we therefore do not discourage LECs from correcting these filings. We do, however, encourage them to finalize each report as rapidly as possible.

c. In every case, filing carriers should make every effort to ensure that the report is complete before the filing of the next report in that series. The next-filed report must note the final submission number of the previous report. For example, Report 43.05 3Q 1991 might note: Report 43.05 2Q 1991 Final Submission was Number 4.

6. Definition of remote switch

Report 43-07 collects information on remote switches in both "total switching entities" (row 110) and "remotes" (row 114). These numbers are different, because row 114 lists only those remotes capable of stand-alone service. Remotes to be included in row 110 are those described in the general definition of remote:

> A remote switching entity can generally be described as a switching entity that has no connection to the facilities network except through one other (host) switching entity, that shares the processing capabilities of another switching system for certain control functions under the direction of the host central processor, and that can be controlled remotely by the host over a pair of dedicated data links.

Service Quality Order, 6 FCC Rcd 2974 (Com.Car.Bur. 1991) at 3081. This definition applies to all remotes; it is used to include remotes in line 110 of Report 43-07, and it is used in Report 43-08. The narrower definition of stand-alone remotes used in row 114 is explained as follows:

> However, row 0114 excludes separate reporting of remotes that are incapable of providing stand alone operation when the host switch fails. Only those remote switching entities that are equipped to operate in a stand alone fashion (*i.e.*, able to operate when the host fails, or the data links to the host fail) to be able to provide more limited service, are to be reported on row 0114.

Id. These definitions are deliberately different, as the data are collected for different purposes.

These modifications of reporting requirements are effective as noted herein. Questions or comments should be directed to Jacqueline Spindler, Accounting and Audits Division, 2000 L St., Suite 812, Washington, DC 20554, telephone 202 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-99

In the Matter of

JEFFREY C. SIGMON

and

STEVEN C. STEWART
Hearing Fee Refunds

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Commission:

1. The Commission has under consideration an Application for Review (Application) jointly filed on behalf of Jeffrey C. Sigmon and Steven C. Stewart (Sigmon and Stewart), former applicants for a new FM radio station at Kershaw, South Carolina. Sigmon and Stewart appeal the Managing Director's denial of their petition for reconsideration seeking refunds of their hearing fees.

2. Sigmon and Stewart's initial request was denied because the applicants had filed their Settlement Agreement after the Notice of Appearance deadline and, therefore, were not eligible for hearing fee refunds. *See* 47 C.F.R. § 1.1111(c)(1), recently redesignated as 47 C.F.R. § 1.1111(c)(4). Their petition for reconsideration was denied on similar grounds.

3. In their Application, Sigmon and Stewart contend that they "had tentatively agreed in principle to settle" prior to the Notice of Appearance deadline, but were prevented from reaching a universal settlement by a third applicant in the proceeding. The remaining applicant indicated no interest in settling and indicated its intention to litigate its case. Accordingly, Sigmon and Stewart each filed a Notice of Appearance accompanied by their requisite hearing fees. However, the remaining applicant subsequently failed to file its Notice of Appearance and later notified the presiding Administrative Law Judge that it had decided not to prosecute its application any further. Sigmon and Stewart, the surviving applicants, filed their Settlement Agreement on May 17, 1990, over thirty days after the Notice of Appearance deadline.

4. We affirm the Managing Director's decision to deny Sigmon and Stewart's request for hearing fee refunds. Hearing fees must be filed in a timely manner or the underlying application will be dismissed. 47 C.F.R. § 1.1107. The Kershaw, South Carolina FM proceeding was designated for hearing on March 13, 1990. *See Hearing Designation Order*, DA 90-312, released March 13, 1990. As applicants in the proceeding, Sigmon and Stewart were required to file Notices of Appearance and tender the hearing fees within twenty days of the mailing of the order. In the absence of timely filed Notices of Appearance and the accompanying hearing fees payment, Sigmon and Stewart's applications were subject to dismissal and their subsequently filed settlement agreement would have been rendered moot. Having filed their Notices of Appearance with the requisite hearing fees, Sigmon and Stewart preserved their status as parties to the Kershaw, South Carolina comparative proceeding, thereby protecting their interests in the settlement agreement.[1]

5. The Commission's purpose in dispensing with fees in the case of timely-filed settlement agreements was to provide competing applicants in a comparative proceeding an incentive to enter negotiations that might result in the universal settlement of the proceeding.[2] In establishing the rules which were in effect at the time Sigmon and Stewart tendered their hearing fees, we concluded that any postponement of the filing time for settlement agreements beyond the Notice of Appearance deadline would not promote settlements but could result in additional expenditure of resources by the Commission and the applicants. *See Establishment of a Fee Collection Program*, 2 FCC Rcd at 966. Therefore, in the case of settlement agreements, our rules provide for hearing fee refunds only when the agreement is filed in a timely manner. *See* 47 C.F.R. § 1.1111(c)(1), redesignated as 47 C.F.R. § 1.1111(c)(4).

6. Sigmon and Stewart argue nevertheless that the facts presented come within the intent of Section 1.1111(c)(1) (now (c)(4)) of the rules because no additional Commission resources were expended by the late-filed settlement agreement. The determination of the appropriate hearing fee, however, was based upon the average cost of comparative proceedings involving applications designated for hearing, not merely those ultimately subject to adjudication. *See Establishment of a Fee Collection Program*, 2 FCC Rcd at 5990. Moreover, Sigmon and Stewart state that they had only "tentatively agreed in principle to settle prior to the date for filing notices of appearance."[3] Absent submission of an actual agreement, as expressly required by the rules, the Commission cannot be assured that a timely settlement in fact has been entered into. We note, for example, that Sigmon and Stewart needed a month after the Notice of Appearance deadline to actually reach settlement. Granting hearing fee refunds under these circumstances would not further the purpose of the rule because it would render the Notice of Appearance deadline requirement meaningless.

7. Accordingly, IT IS ORDERED, that the Application for Review of the Managing Director's March 8, 1991 decision filed by Sigmon and Stewart is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In *Establishment of a Fee Collection Program*, 2 FCC Rcd 947, 985 n. 135 (1987), *recon. denied*, 3 FCC Rcd 5987 (1988), we stated that an applicant must file a settlement agreement by the Notice of Appearance deadline or pay the hearing fee: "[t]he fact that there are ongoing negotiations does not justify the failure to include a fee with the Notice of Appearance."

[2] With the goal of further expediting the comparative process, we now require competing applicants to file their hearing fee payments by a date established in the public notice accepting mutually exclusive applications for filing. *See Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 157-58 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991). We have, however, retained the provision permitting refunds of hearing fee where competing applicants file a settlement agreement that provides for the dismissal of all but one of the applicants. 47 C.F.R. § 1.1111(c)(4).

[3] Application at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Montachusett
Broadcasting, Inc.

Licensee of Radio Station WXLO(FM)
Fitchburg, MA

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: May 28, 1992; Released: June 9, 1992

By the Chief, Mass Media Bureau

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a $5,000.00 Notice of Apparent Liability (NAL) issued October 15, 1991; and, (2) a response to the NAL and a supplement to that response by Montachusett Broadcasting, Inc. (Montachusett), dated November 4, 1991, and December 18, 1991, respectively, requesting that the Commission reduce the amount or rescind the forfeiture.

2. The forfeiture was assessed for willful violation of Section 73.1206 of the Commission's Rules. Station WXLO(FM) placed a telephone call to the complainant, recorded the conversation without having first informed him of its intended broadcast use, and subsequently broadcast the conversation. The facts of this case are set forth in detail in the NAL and will not be repeated here.

3. In support of its request that we reduce the amount or rescind the forfeiture, Montachusett argues that WXLO(FM) had no advance notice of the changes in the criteria used to establish forfeiture amounts as set forth in the August 1, 1991, *Policy Statement, Standards for Assessing Forfeiture*, 6 FCC Rcd 4695 (1991), *recon. pending*. The licensee asserts that because the violation, the Commission's letter of inquiry and its response to that inquiry all took place before the effective date of the *Policy Statement*, the new standards were imposed "retroactively." It contends that WXLO(FM) was subjected to higher penalties than were being imposed upon licensees prior to August 1, 1991, for Section 73.1206 rule violations. The licensee also argues that it is being treated unduly harshly because it was assessed a forfeiture, whereas KROQ-FM was only admonished for a hoax broadcast that Montachusett considers a more serious offense. Montachusett states that the Commission should have used the "downward adjustment criteria," taking into account such factors as seriousness of the violation and the licensee's history of overall compliance with the Commission's Rules.

4. Regarding the argument that the licensee did not have prior notice of changes in the standards for assessing forfeitures, it should be noted that since December 1989, when Congress enacted revisions to the law regarding forfeitures, Section 503(2)(A) of the Communications Act of 1934, as amended, has provided that ". . . the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act. . . ." Since broadcast station licensees are charged with knowledge of the law, Montachusett was on notice prior to the date of the subject violation the forfeiture amounts could be increased. Indeed, the Commission affirmatively attempted to bring this change in the law to the attention of its licensees. *See News Release - FCC Forfeiture Authority Increased*, February 16, 1990. It should also be noted that under the old Section 503 provisions, a violation of Section 73.1206 of the Rules was frequently given a forfeiture of $2,000 – 100% of the statutory maximum – whereas this NAL was only for 20% of the statutory maximum under the new Section 503 provisions.

5. In its December 18, 1991, supplement to its November 4, 1991, response to the NAL, Montachusett states that in light of the Commission's recent decision in a case involving Station KROQ-FM, imposition of a forfeiture is unjustified. In the KROQ-FM case the licensee was issued a letter of admonishment for the broadcast of a hoax. The two cases cannot be compared. Simply, the subject case involves a violation of a Commission rule whereas the KROQ-FM case does not. In the KROQ-FM matter, only a violation of a Commission policy, for which no forfeiture may be imposed, was involved. In a case where a hoax broadcast occurred and the Commission was able to establish that a violation of the Communications Act was also involved, a $25,000 forfeiture was assessed. *See Emmis Broadcasting (KSHE)*, 6 FCC Rcd 2289 (1991). For this reason, the points argued in this supplement are irrelevant to the instant case.

6. Montachusett also requests a rescission or reduction of the $5,000 forfeiture based on the "downward adjustment criteria" set forth in the Commission's August 1, 1991 *Policy Statement* on new standards for assessing forfeitures. In particular, the licensee suggests basing a reduction on its history of overall compliance with the Commission's Rules. A review of Station WXLO(FM)'s past history reveals a record of compliance. For this reason, the Commission will reduce the forfeiture by 20%, which results in a total forfeiture amount of $4,000.

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Montachusett Broadcasting, Inc., licensee of Radio Station WXLO(FM), Fitchburg, MA, FORFEIT to the United Station the sum of four thousand dollars ($4,000) for its willful violation of Section 73.1206 of the Commission's Rules. The payment should be in the form of a check or similar instrument, payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ellipsat Corp.; FOIA Control No. 92-83
TRW Inc.; 92-88, 92-86
Constellation Communications, Inc.

On Request for Inspection of Records

PROTECTIVE ORDER

Adopted: May 28, 1992; Released: May 28, 1992

By the Chief Engineer:

It is ordered:

1. For purposes of this Order, "Confidential Information" shall mean and include trade secrets and commercial or financial information which is privileged or confidential under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4).

2. Confidential information submitted herein by Motorola Satellite Communications, Inc. ("Motorola") shall be segregated from all material filed and deemed non-confidential as generally set forth in the Letters of David R. Siddall, Chief of the Frequency Allocation Branch, Office of Engineering and Technology, Federal Communications Commission, dated May 4, 1992, to Ellipsat Corp., TRW Inc., and Constellation Communications, Inc. Confidential information, as redacted, shall consist of:

a. the printed "Confidential Appendix," tab A1, A2, A4, A5, A6 (only the titles of the patent applications), B1 (except pages 4, 8, and 9), B2 (only pages 1-4), B3 (only pages 1-3) and

b. videotape demonstration of computer program, in lieu of submitted software;

c. tab D - the information contained on videotape.

3. Confidential information may be disclosed:

a. to counsel for American Mobile Satellite Corp.; TRW Inc.; Ellipsat Corporation; LQSS; Constellation Communications, Inc., and Motorola (the "Applicants") and their associated attorneys, paralegals and clerical staff predicated on a "need to know" basis.

b. to specified persons, including employees of the Applicants, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in connection with ET Docket No. 92-28, PP-32.

4. Counsel may request the Commission to provide one copy of Confidential Information (for which counsel must, as a prerequisite, acknowledge receipt pursuant to this Order), and counsel may thereafter make no more than four additional copies but only to the extent required and solely for the preparation and use in this proceeding, and provided further, that all such copies shall remain in the care and control of counsel at all times. Following the filing of Reply Comments on June 12, 1992, counsel shall retain custody of the Confidential Information until such time as it is necessary to prepare additional filings in connection with ET Docket No.92-28 in the discretion of counsel. If such additional filings are necessary, counsel shall retain custody of the Confidential Information following submission of such additional filings. Counsel shall return to the Commission within forty-eight hours after the final resolution of ET Docket. No. 92-28 all Confidential Information originally provided by the Commission as well as all copies made, and shall certify that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel may retain copies of pleadings submitted on behalf of clients.

5. Confidential Information shall not be used by any person granted access under this Order for any purpose, other than for use in this proceeding and shall not be used for competitive business purposes or otherwise disclosed by such persons to any other person except in accordance with this Order. This shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person.

6.

a. Counsel inspecting or copying Confidential Information shall apply for access to the materials covered by this Order under and by use of the "Attorney Application For Access To Materials Under Protective Order" appended to this Order.

b. Counsel may disclose Confidential Information to persons to whom disclosure is permitted under the terms of this Order only after advising such persons of the terms and obligations of this Order.

c. Counsel shall provide to the FCC and, in the absence of a need for confidentiality, to Motorola the name and affiliation of each person other than counsel to whom disclosure is made or to whom actual physical control over the documents is provided. To the extent that anyone's name is not disclosed to Motorola, that fact shall be disclosed to the FCC and Motorola.

7. Applicants may in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. any portions of the pleadings that contain or disclose Confidential Information are physically segregated from the remainder of the pleading;

b. the portions containing or disclosing Confidential Information are covered by a separate letter referencing this Protective Order;

c. each page of any Applicant's filing that contains or discloses Confidential Information subject to this Order is clearly marked "confidential information included pursuant to Protective Order, DA 92-674;"

d. the confidential portion of the pleading shall be served upon the Secretary of the Commission, Motorola and the other Applicants and not placed in the Commission's Public File, unless the Commission directs otherwise. The Applicants may provide courtesy copies to the Legal Advisor to the Chief Engineer, who will distribute the copies to the appropriate Commission personnel.

8. Disclosure of materials described herein shall not be deemed a waiver by Motorola in any other proceeding, judicial or otherwise, of any privilege or entitlement to confidential treatment of such Confidential Information. Inspecting parties, by viewing said documents: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceedings; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

9. The entry of this Order is without prejudice to the rights of Motorola to apply for additional or different protection where it is deemed necessary or to the rights of the Applicants to request further or renewed disclosure of Confidential Information.

10. This Order is issued under Section 0.241 of the Commission's Rules, 47 C.F.R. § 0.241, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.
Complainant,

v. File No. E-91-177

BELL ATLANTIC TELEPHONE COMPANY
Defendant.

ORDER

Adopted: June 2, 1992; Released: June 10, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 30, 1991, Telecom*USA, Inc. filed with the Commission the above-captioned formal complaint seeking recovery of damages for defendant's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. On May 13, 1992, the parties filed a joint motion requesting the Commission to enter an order dismissing the complaint with prejudice. In support of their motion, the parties state that all claims in the action against the defendant have been settled. The parties also state that no purpose would be served by the continuing pendency of this proceeding.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 4, 1992

Advisory Committee on Advanced Television Service
Implementation Subcommittee Meeting

June 30, 1992
10:30 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. Scheduling of Final Report Submissions
6. General Discussion
7. Other Business
8. Date and Location of Next Meeting
9. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairs.

Any questions regarding this meeting should be directed to George Vradenburg III at (213) 203-1334, Dr. James J. Tietjen at (609) 734-2237, or Gina Harrison at (202) 632-7792.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 22, 1992

COMMENT DATES ESTABLISHED

REPORTING REQUIREMENTS FOR INTERNATIONAL TRAFFIC DATA

Comment Date: June 19, 1992
Reply Date: July 6, 1992

The Commission has revised and simplified its requirements for reporting international traffic data. *Report and Order*, CC Docket No. 91-22, Released February 12, 1992. A *Manual for Filing Section 43.61 Data*, dated May 1992, is being made available for notice and comment.

The manual implements the Commission's decision to eliminate obsolete reporting requirements. Other changes include the incorporation of data for Canada, and Saint Pierre and Miquelon, and Mexico; streamlined requirements for pure resellers; a revised definition of minutes to be filed; the addition of two categories of private line service; and, the reporting of new service revenues. The manual also provides a new data format to speed processing. These revisions will reduce the burden on carriers and improve the quality of data received by the Commission.

An original and four copies of comments and reply comments on the *Manual for Filing Section 43.61 Data* should be filed with the Office of the Secretary, 1919 M St. N.W. Washington D.C, 20554, Room 222. Comments must be filed by June 19, 1992. Reply comments must be filed by July 6, 1992.

All carriers that provided international service in 1991, including pure resale carriers, must file 1991 international traffic data in compliance with the current Section 43.61 of the Rules. Carriers may use the new reporting procedures on an interim basis for reporting 1991 data.

The manual is available for reference in the Industry Analysis Division Reference Room, Common Carrier Bureau, 1250 23rd Street, N.W., Plaza Level. Copies may be purchased by calling Downtown Copy Center (DCC) at (202) 452-1422. For more information contact Linda Blake or Jim Lande of the Industry Analysis Division at 202-632-0745.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1202 Released: June 10, 1992

GUIDELINES FOR FILING DOMESTIC SATELLITE EARTH STATION APPLICATIONS

This Public Notice is intended to provide applicants with information that will increase the likelihood of filing successful earth station applications. Incomplete and incorrect applications result in processing delays for applicants, and increased work for the Satellite Radio Branch staff. References below are from 47 C.F.R. Part 2 and 25 of the FCC Rules and Regulations.

1. Form 493 should be properly and completely filled out, signed and dated. In order to answer Question No. 25 for transmitting earth stations, see attached Radiation Evaluation Guidelines. (Section 25.110-119)

2. All technical exhibits should be complete.

3. Earth stations should be in compliance with all FCC technical requirements. (Section 25.201-300)

4. Emission designators should be in new format and correct. (Section 2.201-202)

5. Antenna location information should be clear; if antenna is located on a building, a sketch with heights should be included. (Section 25.111)

6. If earth station contains more than one antenna, a site sketch is required. (Seciton 25.111)

7. At 4/6 GHz, frequency coordination with terrestrial systems should not be more than six months old.

8. At 12/14 GHz, no frequency coordination with terrestrial systems should be filed since the Fixed Satellite Service is the only primary service allocated in these bands in the United States.

9. No receive-only earth station applications in the 11.7-12.2 GHz band will be accepted.

10. Form 430 is required with initial application for a transmit station. (Section 25.115)

11. An original and two copies of application should be filed for any new station or modification. (Section 25.110)

12. For assignment and transfer applications, an original and two copies should be filed; for applications with more than one call sign, an original and one copy should be filed for each additional call sign included in application.

13. An original and five copies of application are required for initial VSAT network applications.

14. Form 493 should be used for modification applications, showing only those parameters that are being changed or added (clearly distinguishing changes from additions). (Section 25.117)

15. Amendments should include applicant name, call sign, and file number of pending application.

Radiation Evaluation Guidelines

When applying for a license to construct and operate an earth station, licensees must certify whether grant of the application may have a significant environmental impact as defined in Section 1.1307 of the Commission's rules, 47 C.F.R. Section 1.1307. (Question No. 25, FCC Form 493.) In making this determination, the applicant must determine whether (1) the proposed facility is categorically deemed to have a potential significant effect (Section 1.1307(a)) or (2) whether the guidelines for radiofrequency radiation levels are exceeded (Section 1.1307(b)). If either of these determinations are affirmative, the applicant must submit an environmental assessment (EA) with its application (Section 1.1308 and 1.1311).

In order for an applicant to make a proper certification with respect to radiofrequency radiation levels, the applicant should prepare a radiation hazard study in advance of filing its application. The reference document for performing the radiation evaluation is OST Bulletin No. 65. The title of the bulletin is "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," October, 1985. It is available from the National Technical Information Service, 1-800-553-NTIS, and the order number is PB 86-127081. The radiation evaluation should consider the contributions to power density levels of any nearby non-categorically excluded transmitters that could add significantly to potential exposure levels. Non-categorically excluded facilities and operations are defined in Section 1.1307(b) and include AM and FM radio stations, television stations, LPTV or TV translator stations, FM Booster stations with ERP in excess of 100 watts, ITFS, MDS, or MMDS stations with EIRP in excess of 200 watts, experimental stations, and other satellite earth stations. Any non-categorically excluded station (as defined in Section 1.1307(b)) that contributes less than 1% of the applicable RF exposure limit at the uplink site in question would not be considered as a "nearby" transmitter and need not be considered in the engineering study.

We have provided an example of a radiation hazard study below. If there are no potential hazards and no applicable limits are exceeded (and if the facility is not categorically included in Section 1.1307(a)), the applicant may certify no significant environmental effect on FCC Form 493. If there is a potential hazard, applicants must submit an EA containing a summary table and a conclusion paragraph similar to the example below. If an applicant certifies no significant effect and the facility is found, upon staff review, to exceed the applicable radiofrequency radiation guidelines, the Commission may request the licensee to submit its radiation hazard study. The licensee may also be subject to forfeiture if there has been a misrepresentation or lack of candor in its application, pursuant to *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending.*

Summary Table

Region	Radiation Level (mW/cm2)	Hazard Assessment
Far Field RF = 620 m	1.0	Complies with Guidelines
Near Field Rn = 255 m	3.5	Complies with Guidelines
Transition Region Rt Rn < Rt < Rf	< 3.5	Complies with Guidelines
Between Main Reflector	94	Potential Hazard and
Subreflector		
Reflector Surface	2.1	Complies with Guidelines
Between Antenna and	.9	Complies with Guidelines

CONCLUSION: Based on the above analysis it is concluded that harmful levels of radiation will not exist in regions normally occupied by the public or the earth station's operating personnel. The earth station will be marked with the standard radiation hazard warnings, on the antenna itself, warning personnel to avoid the area in front of the reflector when the transmitter is operational. To ensure compliance with the safety limits, the earth station transmitter will be turned off whenever maintenance and repair personnel are required to work in an area where the radiation level exceeds the level recommended by applicable guidelines. Additionally, the earth station is secured and access is controlled.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-111

In the Matter of

Miscellaneous Amendments to
Part 80 of the Rules Governing
the Maritime Radio Services.

REPORT AND ORDER

Adopted: May 22, 1992; Released: June 10, 1992

By the Commission:

I. INTRODUCTION

1. In a *Notice of Proposed Rule Making* (*Notice*), 6 FCC Rcd 2478 (1991), the Commission proposed to amend Part 80 of the Rules, 47 C.F.R. Part 80, to clarify the maritime frequency tolerance rules, to change the certification requirements for field strength measurements on radiotelegraph ship installations, and to update and correct various Part 80 rule sections. This Report and Order adopts the rule amendments substantially as proposed.

II. DISCUSSION

2. *Frequency tolerance.* Section 80.209 of the Rules, 47 C.F.R. § 80.209, contains the frequency tolerance requirements for all transmitters that operate in the maritime frequency bands. Because of the various changes to the frequency tolerance rules made over the years[1] and the fact that we "grandfathered" equipment when many of these changes were implemented, there are multiple cut-off dates currently specified in the rules, some of which are obsolete. Additionally, as Mackay Communications (Mackay) points out in their request for rule clarification[2] the frequency tolerance table is incomplete, *i.e.*, there are blanks or gaps in the table that lead to confusion regarding the frequency tolerances applicable to certain equipment type approved before November 30, 1977, and in use after January 1, 1990.[3]

3. In the *Notice*, we proposed to correct, clarify, and simplify the frequency tolerance table contained in Section 80.209(a) of the Rules. Specifically, we proposed to eliminate one entire column in the table that ceased being applicable after January 1, 1990, and to eliminate other references to dates since passed that have no continuing relevancy. Further, where a gap exists in the table, we proposed to insert the appropriate frequency tolerance consistent with Appendix 7 of the international Radio Regulations (Geneva, 1979) and the rules applicable to transmitters type accepted or approved after November 29, 1977. In addition, we proposed to "grandfather" existing ship station manual Morse Code telegraphy transmitters type approved before November 30, 1977, operating in the 100-525 kHz band which meet the pre-January 1, 1990, frequency tolerance requirements.[4] This type of equipment is required to be carried on board large ocean going vessels as part of today's international ship-to-ship distress and safety system.[5] This system and the subject equipment will be phased out internationally during the 1992-1999 time frame while the new Global Maritime Distress and Safety System (GMDSS) is phased in.[6] The continued carriage of these telegraph transmitters by the less than 400 subject vessels will not cause interference or affect the safety of these vessels. No comments were filed addressing this issue. Accordingly, for the reasons indicated above, we are amending the rules as proposed.

4. *Field strength measurements.* A vessel required to carry a manual Morse code radiotelegraph installation must have its equipment inspected at least once every 12 months. *See* Section 80.802 of the Rules, 47 C.F.R. § 80.802. Further, as part of the inspection, the licensee must certify that the minimum communications range of the ship's radiotelegraph station on 500 kHz (an international distress and safety frequency) is 200 nautical miles for the main installation and 100 nautical miles for the reserve installation. *See* Section 80.802(a)(2) of the Rules, 47 C.F.R. § 80.802(A)(2). The certification may be accomplished either by producing a record of communications between ships that are the required distance apart or by arranging for a professional engineer, not affiliated with the licensee or its service company, to conduct field strength measurements.

5. The *Notice* proposed to amend the rules to permit the use of a licensee's employee to conduct the field strength measurements instead of the requirement that they be conducted by an independent professional engineer. The

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[1] *See*, for example Report and Order in PR Docket No. 85-145, 51 Fed. Reg. 31206 (1986), that among other things implemented changes to the frequency tolerances for radio transmitting apparatus as a result of the Final Acts of the 1979 World Administrative Radio Conference (1979 WARC).

[2] *See* letter from Mr. Lionel Martens, Technical Manager, Mackay Communications, to Mr. Robert E. Mickley, Chief, Aviation and Marine Branch, Federal Communications Commission, dated August 31, 1989.

[3] Equipment type accepted or approved after November 29, 1977, must meet the frequency tolerance specified in Section 80.209(a).

[4] International Radio Regulation No. 342 (Geneva, 1979) permits Administrations to vary from the provisions of the Radio Regulations provided no harmful interference is caused to stations operating in accordance with the Radio Regulations.

[5] There are three types of transmitters affected: transmitters used for the main ship station, transmitters used for the emergency ship station and survival craft transmitters.

[6] The GMDSS will replace the present maritime distress and safety system, which relies on ship-to-ship distress alerting using manual Morse code, with a fully automated ship-to-ship distress alerting system using satellite and digital technologies. It will provide a new standard of safety for seafarers worldwide. It will be phased in internationally from 1992-1999. Provisions for implementing the GMDSS into the Commission's Rules were proposed in the Notice of Proposed Rule Making, PR Docket No. 90-480, 5 FCC Rcd 6212 (1990).

Notice noted that the ship's radio officer, an employee of the licensee, generally conducts the ship-to-ship communications used to satisfy the certification requirements of Section 80.802(a)(2). Further, it pointed out we have accepted similar certifications by the licensee's employees. For example, the Commission can accept a ship's master's certification that the calibration of the ship's direction finder will be conducted by a "competent technician." *See* Section 80.822(a) of the Commission's Rules, 47 C.F.R. § 80.822(a). The *Notice* proposed, therefore, to amend the rules to permit any person, holding either a general radiotelephone license or at least a second class radiotelegraph license to conduct the field strength measurements. The American Institute of Merchant Shipping strongly supported the proposal. No other comments addressed this issue. Therefore, for the reasons stated above, we are amending the rules as proposed.

6. *Editorial changes.* In the *Notice* to this proceeding, we proposed to make editorial changes to Part 80 to clarify and correct minor discrepancies. The United States Coast Guard (Coast Guard) suggested further clarifying the rules to reidentify certain VHF maritime radiotelephone channels that are allotted as duplex channels internationally, but allotted as simplex channels in the U.S. by adding the letter "A" after the channel identification number (*e.g.*, channel 5A, 22A). The Coast Guard notes that their working channel, marine VHF channel 22, is simplex in the U.S. and duplex internationally. Further, the Coast Guard notes that this terminology is commonly used in the maritime community and that identifying such marine VHF channels as simplex may avoid confusion. Therefore, we are amending the rules substantially as proposed, as well as incorporating the Coast Guard's suggested editorial changes and several other minor nonsubstantive changes.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 80 of the Commission's Rules, 47 C.F.R. Part 80, IS AMENDED as set forth below.

8. IT IS FURTHER ORDERED THAT this Report and Order will be effective (thirty days after publication in the Federal Register).

9. For further information contact: Susan H. R. Jones, Private Radio Bureau, (202) 632-7175.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULE

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.5 is amended by removing "Future" from the entry for *Future global maritime distress and safety system (FGMDSS)* to read *Global maritime distress and safety system (GMDSS)*.

3. Section 80.23 is amended by adding a sentence at the end of the introductory paragraph, removing paragraph (c) and redesignating paragraphs (d) and (e) as (c) and (d) to read as follows:

§ 80.23 Filing of applications.

*** Applications requiring fees as set forth at Part 1, Subpart G of this Chapter must be filed with the Federal Communications Commission in accordance with § 1.1102 of the Rules.

* * * * *

4. Section 80.207(d) is amended by revising footnote 2 to read:

§ 80.207 Classes of emission.

* * * * *

(d) * * *

[2]Frequencies used in the automated multi-station system. See § 80.385(c).

* * * * *

5. Section 80.209 is amended by revising paragraph (a) and the table following paragraph (a) to read as follows:

§ 80.209 Transmitter frequency tolerances.

(a) The frequency tolerance requirements applicable to transmitters in the maritime services are shown in the following table. Tolerances are given as parts in 10^6 unless shown in Hz.

Frequency bands and categories of stations	**Tolerances[1]**
(1) Band 100-525 kHz	
(i) Coast stations:	
For single sideband emissions.	20 Hz
For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]

For transmitters with digital selective calling emissions.	10 Hz
For all other emissions.	100
(ii) Ship stations:	
For transmitters with single sideband emissions type accepted or type approved before November 30, 1977.	20 Hz
For transmitters with other emissions type accepted or type approved before November 30, 1977.	1000[5]
For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
For transmitters with digital selective calling emissions.	10 Hz[3]
For all other transmitters type accepted or type approved after November 29, 1977.	20 Hz
(iii) Ship stations for emergency only:	
For transmitters type approved before November 30, 1977.	3000[5]
For all transmitters type accepted or type approved after November 29, 1977.	20 Hz
(iv) Survival craft stations:	
For transmitters type approved before November 30, 1977.	5000[5]
For transmitters type approved or type accepted after November 29, 1977.	20 Hz
(v) Radiodetermination stations:	
For all emissions.	100
(2) Band 1600-4000 kHz	
(i) Coast stations and Alaska fixed stations:	
For single sideband and facsimile emissions.	20 Hz
For narrow-band direct-printing and data emissions.	10 Hz[2]
For digital selective calling emissions.	10 Hz
For all other emissions.	50
(ii) Ship stations:	
For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
For transmitters with digital selective calling emissions.	10 Hz[3]
For all other transmitters	20 Hz
(iii) Survival craft stations:	20 Hz
(iv) Radiodetermination stations:	
With power 200W or less.	20
With power above 200W.	10
(3) Band 4000-27500 kHz	
(i) Coast stations and Alaska fixed stations:	
For single sideband and facsimile emissions.	20 Hz
For narrow-band direct printing printing and data emissions.	10 Hz[2]
For digital selective calling emissions.	10 Hz
For Morse telegraphy emissions.	10
For all other emissions.	15
(ii) Ship stations:	
For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
For transmitters with digital selective calling emissions.	10 Hz[3]
For all other transmitters	20 Hz
(iii) Survival craft stations:	50 Hz
(4) Band 72-76 MHz	
(i) Fixed stations:	
Operating in the 72.0-73.0 and 75.4-76.0 MHz bands.	5
Operating in the 73.0-74.6 MHz band.	50

(5) Band 156-162 MHz	
(i) Coast stations:	
For stations licensed to operate with a carrier power:	
Below 3 watts.	10
3 to 100 watts.	5
Above 100 watts.	2.5
(ii) Ship stations:	10[4]
(iii) Survival craft stations operating on 121.500 MHz:	50
(iv) EPIRBs:	
Operating on 121.500 and 243.000 MHz.	50
Operating on 156.750 and 156.800 MHz.	10
(6) Band 216-220 MHz	
(i) Coast Stations:	
For all emissions.	5
(ii) Ship stations:	
For all emissions.	5
(7) Band 400-466 MHz	
(i) EPIRBs operating on 406.025 MHz.	5
(ii) On-board stations.	5
(iii) Radiolocation and telecommand stations.	5
(8) Band 1626.5-1646.5 MHz	
(i) Ship earth stations:	5

FOOTNOTES

[1] Transmitters authorized prior to January 2, 1990, with frequency tolerances equal to or better than those required after this date will continue to be authorized in the maritime services provided they retain type acceptance and comply with the applicable standards in this part.

[2] The frequency tolerance for narrow-band direct printing and data transmitters installed before January 2, 1992, is 15 Hz for coast stations and 20 Hz for ship stations. The frequency tolerance for narrow-band direct printing and data transmitters type accepted or installed after January 1, 1992, is 10 Hz.

[3] Until February 2, 1999, the frequency tolerance for DSC ship station transmitters in the MF and HF bands that were installed before January 2, 1992, is 20 Hz. The frequency tolerance for DSC ship station transmitters in the MF and HF bands type accepted or installed after January 1, 1992, is 10 Hz. After February 1, 1999, the frequency tolerance for all DSC ship station transmitters in the MF and HF bands (regardless of installation date) is 10 Hz.

[4] For transmitters in the radiolocation and associated telecommand service operating on 154.585 MHz, 159.480 MHz, 160.725 MHz and 160.785 MHz the frequency tolerance is 15 parts in 106.

[5] This frequency tolerance applies to ship station transmitters until February 1, 1999. Thereafter, the frequency tolerance is 20 Hz.

* * * * *

6. In Section 80.371 the table in paragraph (c) is amended by revising the first sentence in footnote 3 to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(c) * * *

[3]Within 121 kilometers (75 miles) of the United States/Canada border, in the area of the Puget Sound and the Strait of Juan de Fuca and its approaches, the frequency 157.425 MHz is available for use by ship stations for public correspondence communications only. * * *

7. In Section 80.373 paragraph (f) is amended by revising the introductory text, adding the capital letter "A" to the numeric channels 01, 05, 07, 18, 19, 20, 22, 63, 65, 66, 78, 79, 80 and 88 listed under the column titled "Channel designator" in all tables to read 01A, 05A, 07A, 18A, 19A, 20A, 22A, 63A, 65A, 66A, 78A, 79A, 80A and 88A, adding footnote 14 to the entry for channel 70 and revising the entry and footnote for newly designated channel 20A to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(f) * * * The following tables describe the carrier frequencies available in the 156-162 MHz band for radiotelephone communications between ship and private coast stations. (Note: the letter "A" following the channel designator indicates simplex operation on a channel designated internationally as a duplex channel.)

Frequencies in the 156-162 MHz band

* * * * *		
20A[12]	157.000	Intership only
* * * * *		
7014	156.525	156.525
* * * * *		

[12]The duplex pair for channel 20 (157.000/161.600 MHz) may be used for ship to coast station communications.

* * *

[14]The frequency 156.525 MHz is to be used exclusively for distress, safety and calling using digital selective calling techniques. No other uses are permitted.

* * * * *

8. Section 80.375(a) is amended by replacing the frequencies 121.500 kHz and 243.000 kHz with 121.500 MHz and 243.000 MHz, respectively.

9. Section 80.377 is amended by revising the last sentence to read as follows:

§ 80.377 Frequencies for ship earth stations.

* * * The frequency band 1645.5-1646.5 MHz is reserved for use in the Global Maritime Distress and Safety System (GMDSS).

10. Section 80.802 is amended by revising paragraph (a)(2) to read as follows:

§ 80.802 Inspection of station.

(a) * * *

(1) * * *

(2) At inspection, the minimum field strength capability of the main installation and reserve installation when connected to the main antenna may be shown by the licensee by one of the following methods:

(i) Producing a record of communications on 500 kHz over a minimum distance of 370 kilometers (200 nautical miles) for the main installation and 185 kilometers (100 nautical miles) for the reserve installation which demonstrates the transmission and reception of clearly perceptible signals from ship to ship by day and under normal conditions and circumstances, or

(ii) Provide documentation by a professional engineer, or a person holding a first or second class radiotelegraph operator's certificate, or a general radiotelephone operator license, that the installation produces at 1.85 kilometers (one nautical mile) a minimum field strength of thirty (30) millivolts per meter for the main installation and ten (10) millivolts per meter for the reserve installation. The licensee shall provide, at a minimum, the name and license number of the individual making the measurements or record of communications.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-372

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS). RM-5712

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 28, 1992; Released: June 10, 1992

By the Commission:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* dismisses as moot the Association for Maximum Service Television, Inc. (MSTV) Petition for Reconsideration requesting we reconsider our determination that no harmful interference would result from expanding Automated Maritime Telecommunications System (AMTS)[1] operations to the Group C and D channels.[2]

II. DISCUSSION

2. In the *Notice of Proposed Rule Making*, 3 FCC Rcd 4736 (1988), we proposed to permit nationwide (*i.e.*, throughout the 50 states) AMTS operations in the entire 216-220 MHz band (Group A, B, C and D channels). In the *First Report and Order*, 6 FCC Rcd 437 (1991), we amended the rules to permit AMTS operations on a nationwide basis and concluded that the safeguards built into the rules to protect TV channel 13 operations would allow nationwide use of all four Groups of AMTS channels.[3] Because of the *Notice of Proposed Rule Making* in GEN Docket No. 91-2, 6 FCC Rcd 1368 (1991), which proposed to reallocate a portion of the Group C and D spectrum, we amended the rules to provide for nationwide AMTS operation only on Group A and B channels. A decision on allowing nationwide use of Group C and D channels was held in abeyance pending the outcome of that proceeding.

3. MSTV filed a Petition for Reconsideration, *see* FCC Public Notice No. 1841, March 21, 1991, requesting that we reconsider our conclusion in the *First Report and Order* that no harmful interference to TV Channel 13 reception would result from AMTS operation on frequencies below 217.000 MHz (Group C and D channels) in areas closer than 105 miles to television stations operating on TV Channel 13. *See* MSTV petition at 10. Waterway Communications System, Inc. (Watercom), and Riverphone, Inc. (Riverphone) filed comments opposing MSTV's Petition for Reconsideration. MSTV filed reply comments.

4. As noted previously, we withheld consideration of issues pertaining to the nationwide expansion of AMTS operations on Group C and D channels. These issues were to be addressed after consideration of the *Notice of Proposed Rule Making* in GEN Docket No. 91-2 seeking a portion of the 216-220 MHz band for a new interactive video and data service (IVDS). In view of the decision in GEN Docket No. 91-2 to reallocate the 218-219 MHz band (Group C and D ship transmit channels) for IVDS, *See* 7 FCC Rcd 1630 (1992), the issue of AMTS operation on Group C & D channels is moot.[4] We have made editorial changes to the Rules, however, to reflect the reallocation of the Group C and D ship channels.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r) and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), the Petition for Reconsideration filed by MSTV IS DISMISSED AS MOOT.

6. IT IS FURTHER ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 80 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective (30 days after publication in the Federal Register). Because these amendments ordered herein are non-substantive and editorial in nature, and, therefore, not controversial, they constitute minor amendments to our rules in which the public is not likely to be interested. For good cause shown, compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. Section 553(b)(B).

7. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

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[1] The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system, including non-voice services, for vessels to use as they move along a waterway. It offers improved services over those available from individual public coast stations.

[2] There are 80 channel pairs in the AMTS, divided into four groups of 20 (Groups A, B, C and D). *See* Section 80.385, 47 C.F.R. § 80.385.

[3] In the *First Report and Order*, we rejected broadcasters argument that there would be greater risk of interference to TV reception from AMTS operation on the Group C and D channels. These rules require an AMTS licensee to demonstrate no harmful interference to broadcast operations, but, more importantly, if interference does occur the AMTS licensee must eliminate it or cease operation. *See* 47 C.F.R. §§ 80.215(h)(1)-(5) and 80.475(b)(1)&(2). We concluded that TV reception interference concerns had been thoroughly considered and resolved.

[4] The reallocation of Group C and D ship channels for IVDS leaves 40 single channels (Group C and D coast stations). AMTS is designed to use channel pairs. We will decide at a later time how these single channels can best be used.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULE

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 -- Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 U.S.T. 3450, 3 U.S.T. 4726, 12 U.S.T. 2377.

2. Section 80.385 is amended by revising paragraph (a)(2) to read as follows:

§ 80.385 Frequencies for automated systems.

(a) * * *

(2) The following carrier frequency pairs are available for radiotelephony, facsimile and teleprinter communications. AMTS operations must not cause harmful interference to the U.S. Navy SPASUR system which operates in the band 216.880-217.080 MHz.

	Carrier frequency (MHz)		
Channel No.	Ship transmit[1]	Coast transmit	Group[2]
101	----	216.0125	D
102	----	216.0375	
103	----	216.0625	
104	----	216.0875	
105	----	216.1125	
106	----	216.1375	
107	----	216.1625	
108	----	216.1875	
109	----	216.2125	
110	----	216.2375	
111	----	216.2625	
112	----	216.2875	
113	----	216.3125	
114	----	216.3375	
115	----	216.3625	
116	----	216.3875	
117	----	216.4125	
118	----	216.4375	
119	----	216.4625	
120	----	216.4875	
121	----	216.5125	C
122	----	216.5375	
123	----	216.5625	
124	----	216.5875	
125	----	216.6125	
126	----	216.6375	
127	----	216.6625	
128	----	216.6875	
129	----	216.7125	
130	----	216.7375	
131	----	216.7625	
132	----	216.7875	
133	----	216.8125	
134	----	216.8375	
135	----	216.8625	
136	----	216.8875	
137	----	216.9125	
138	----	216.9375	
139	----	216.9625	
140	----	216.9875	
141	219.0125	217.0125	B
142	219.0375	217.0375	
143	219.0625	217.0625	
144	219.0875	217.0875	
145	219.1125	217.1125	
146	219.1375	217.1375	
147	219.1625	217.1625	
148	219.1875	217.1875	
149	219.2125	217.2125	
150	219.2375	217.2375	
151	219.2625	217.2625	
152	219.2875	217.2875	
153	219.3125	217.3125	
154	219.3375	217.3375	
155	219.3625	217.3625	
156	219.3875	217.3875	
157	219.4125	217.4125	
158	219.4375	217.4375	
159	219.4625	217.4625	
160	219.4875	217.4875	
161	219.5125	217.5125	A
162	219.5375	217.5375	
163	219.5625	217.5625	
164	219.5875	217.5875	
165	219.6125	217.6125	
166	219.6375	217.6375	
167	219.6625	217.6625	
168	219.6875	217.6875	
169	219.7125	217.7125	
170	219.7375	217.7375	
171	219.7625	217.7625	
172	219.7875	217.7875	
173	219.8125	217.8125	
174	219.8375	217.8375	
175	219.8625	217.8625	
176	219.8875	217.8875	
177	219.9125	217.9125	
178	219.9375	217.9375	
179	219.9625	217.9625	
180	219.9875	217.9875	

FOOTNOTES

[1] Ship transmit frequencies in Group C and D are not authorized for AMTS use.

[2] Coast station operation on frequencies in Group C and D are not currently assignable.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-121

In re Applications of

ROSAMOND RADIO, INC. (hereafter "RRI") File No. BPH-910225MG

JAMIE LEIGH COBERLY (hereafter "Coberly") File No. BPH-910225MH

DIANE K. HITT (hereafter "Hitt") File No. BPH-910225MI

For Construction Permit
for a New FM Station on Channel 228A
in Rosamond, California

HEARING DESIGNATION ORDER

Adopted: May 18, 1992; Released: June 11, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *RRI.* An engineering study of RRI's application reveals that it is short-spaced to the licensed facilities of co-channel Station KRZE-FM, Ontario, California, on Channel 228A. RRI recognizes this short-spacing and requests processing pursuant to the contour protection provisions of 47 C.F.R. § 73.215. On July 11, 1991, Hitt filed an objection against RRI's application alleging that the engineering proposal would be in violation of the 8.0 kilometer requirement of 47 C.F.R. § 73.215(e). RRI's opposition, filed on August 2, 1991, states that based on the Commission's rules, as well as the obvious purpose of those rules, its proposal complies with the clear language of 47 C.F.R. § 73.215.

3. The Commission, in its *Report and Order* to MM Docket 87-121, adopted 47 C.F.R. § 73.215 to afford FM applicants and licensees some flexibility in the selection of transmitter sites.[2] In this *Report and Order* the Commission established a temporary 8.0 kilometer maximum short-spacing requirement. *Report and Order,* at 1688. The Commission recently affirmed the 8.0 kilometer requirement upon reconsideration.[3] During the pendency of MM Docket 87-121, the Commission had before it MM Docket 88-375 which proposed, in part, to increase the spacing requirements and maximum transmitting power for Class A stations. The Commission, in its *Second Report and Order* to MM Docket 88-375, increased the spacing requirements of 47 C.F.R. § 73.207 and increased the maximum permitted effective radiated power for Class A FM broadcast stations from 3.0 to 6.0 kilowatts.[4] In the *Second Report and Order,* the Commission stated that applications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current rules. *Second Report and Order,* at 6382. In the instant case, Channel 228A was allotted to Rosamond, California in the Commission's *Notice of Proposed Rule Making* in MM Docket 89-344, 4 FCC Rcd 6188 (1989).*See Report and Order* in MM Docket No. 89-344, 5 FCC Rcd 7408 (1990). Since this rule making was initiated before the October 2, 1989 effective date of the new Section 73.207 rules, and the Rosamond allotment is short spaced to the licensed facilities of KRZE-FM under the new rules, applications for the Rosamond allotment could be processed pursuant to 47 C.F.R. 73.213(c)(1), which permits these applicants to use the old Section 73.207 spacing rules.[5] Therefore, applying the 8.0 kilometer restriction to the spacing requirement of the old Section 73.207, RRI's proposal is not in violation of the 8.0 kilometer restriction of 47 C.F.R. § 73.215(e). Accordingly, Hitt's objection against RRI's application will be denied. We note that RRI's application is in compliance with all other aspects of 47 C.F.R. § 73.215.

4. *Transmitter Location.* On August 20, 1991, Hitt filed an informal objection against Coberly's application alleging that the engineering proposal will not provide either city grade coverage or line-of-sight to Rosamond as required by 47 C.F.R. § 73.315. Coberly's opposition, filed on September 5, 1991, indicates that based on the prediction method prescribed by the Commission's rules, its proposal provides the requisite city grade coverage and the terrain between the proposed transmitter site and the city of Rosamond does not constitute a "major obstruction" under Section 73.315. In addition, Coberly's opposition argues that Hitt misstates the city boundaries of Rosamond as the area served by the Rosamond post office when it is "the Commission's well established policy that an unincorporated community is defined by its census designated boundaries."

5. Section 73.315(a) of the rules, 47 C.F.R. § 73.315(a), requires that the transmitter location be chosen so that "a minimum field strength of 70 dB above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served." Section 73.315(b) states, in pertinent part that "[t]he location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path." The Commission has allowed minor deviations of line-of-sight,

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[1] A fourth applicant, BPH-910226MD, was dismissed on July 29, 1991, for violation of the Mexico-United States FM Broadcasting Agreement.

[2] *See Report and Order,* MM Docket No. 87-121, adopted December 12, 1988, released February 22, 1989, 4 FCC Rcd 1681, 1684 (1989).

[3] *See Memorandum Opinion and Order,* MM Docket No. 87-121, released on September 17, 1991, 6 FCC Rcd 5356, 5359 (1991).

[4] *See Second Report and Order,* MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[5] The *Report and Order* in MM Docket No. 89-344, at footnote 4, 5 FCC Rcd 7408 (1990), indicated that applicants could avail themselves of the provisions of 47 C.F.R. § 73.213(c)(1).

stating that Section 73.315(b) "does not absolutely require line-of-sight over an FM applicant's principal community." *Rush County Broadcasting Co., Inc.*, 20 RR 2d 783 (1970). In *Jesse Willard Shirley*, 24 RR 2d 982 (1972), the Commission held that there was no violation of Section 73.315(b) where the city to be served was covered by the 3.16 mV/m contour despite the fact that several hills obstructed the line-of-sight into the city. In addition, the Commission has adopted the doctrine of "substantial compliance" with respect to the city coverage rules. If an applicant provides service to 80% of the residential area of its community of license, it is in substantial compliance with the city coverage requirement. *John R. Hughes, et al.*, 50 Fed. Reg. 5679 (1985). Determinations of substantial compliance and accurate measurements cannot be made where applicants are basing their coverage predictions on inconsistent assessments of the city's boundaries. In order to properly evaluate each applicant's proposal, the Commission must examine the applications and their assertions from a standardized frame of reference. Since there appears to be a substantial and material question of fact as to the boundaries of Rosamond, an appropriate issue will be specified as to all applicants. In addition, the objection filed by Hitt will be denied.

6. *Other Matters.* Our engineering study indicates that Coberly and Hitt failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicant must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Coberly and Hitt failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Coberly and Hitt will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

7. The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Coberly has filed such statement, it is deficient. Coberly has not listed a minority organization. Accordingly, Coberly will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. Coberly petitioned for leave to amend her application on June 27, 1991, and November 12, 1991. The accompanying amendments were filed after May 17, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. Section III, Item 3 of FCC Form 301 requires that an applicant identify each source of funding, including the name, address and telephone number of the source. Hitt has not completed Item 3 correctly. Hitt's application identifies Bruce W. Gary as a lender, but does not give his address. Accordingly, Hitt must submit an amendment which gives all the information required by Section III, Item 3 to the presiding Administrative Law Judge after this Order is released.

10. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposals of the applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Coberly and Hitt in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment,

to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the objections filed by Hitt against the applications of RRI and Coberly ARE DENIED.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Coberly and Hitt shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Coberly shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Coberly ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extend indicated herein.

17. IT IS FURTHERED ORDERED, That Hitt shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this order.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166,168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 4, 1992

Pioneer's Preference Requests
Accepted in ET Docket No. 92-100

The Chief Engineer today accepted for comment seven requests for pioneer's preference in the 900 MHz narrowband data and paging proceeding (ET Docket No. 92-100). The requests were submitted by the following parties and assigned the file (PP) numbers indicated at the beginning of each line.

PP-79: Freeman Engineering Associates on June 1, 1992
PP-80: Global Enhanced Messaging Venture on June 1, 1992
PP-81: Metriplex, Inc. on June 1, 1992
PP-82: Mobile Communications Corporation of America on June 1, 1992
PP-83: Montauk Telecommunications Company on May 29, 1992
PP-84: Paging Network, Inc. on June 1, 1992
PP-85: Skycell Corporation on May 29, 1992

Acceptance of these requests is not to be construed as indicating that each request has met all the criteria for pioneer's preference consideration specified in Section 1.402(a) of the Commission's Rules.

Additionally, supplemental or amended pioneer's preference requests were received from the following parties.

PP-35: Dial Page, L. P. on June 1, 1992
PP-37: Mobile Telecommunication Technologies Corp. on June 1, 1992
PP-38: PacTel Paging (advanced architecture paging) on June 1, 1992
PP-39: PacTel Paging (ground-to-air paging) on June 1, 1992

Parties desiring to comment on any of the above submissions must reference *both* the file number and Docket 92-100 on the cover page of their comments. Comments must be submitted by June 19, 1992. Reply comments must be submitted by June 29, 1992.

These submissions are available for inspection in the ET Docket No. 92-100 file at the FCC public reference room (Room 239), 1919 M Street N.W., Washington, DC 20554. Copies of these submissions may also be obtained from Downtown Copy Center, (202) 452-1422. For further information, contact Rodney Small, Office of Engineering and Technology, (202) 653-8116.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Com III TV, Inc.
(Assignor) BALCT-920320KE

and

Mid-State Television, Inc.
(Assignee)

For Consent to Assignment of License
of Station WCOM(TV), Mansfield, Ohio

and

Mid-State Television, Inc.

For Construction BPCT-920324KG
Permit to Modify
Facilities of Station WCOM(TV),
Mansfield, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992; Released: June 11, 1992

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it for consideration: (1) the above-captioned applications (BALCT-920320KE and BPCT-920324KG) for consent to the assignment of the license of UHF station WCOM(TV), channel 68, Mansfield, Ohio, from Com III TV, Inc. (Com III), to MidState Television, Inc. (Mid-State), and the contingent application for modification of WCOM(TV)'s facilities; (2) a petition to deny the applications filed on April 23, 1992, by Ashland Broadcasting Corporation (Petitioner), licensee of stations WNCO(AM) and WNCO-FM, Ashland, Ohio; (3) an opposition filed on May 7, 1992, by Mid-State; and (4) a reply to the opposition filed on May 14, 1992.

WAIVER REQUEST

2. The principals of Mid-State control the licensees of WRGM(AM), Ontario, Ohio, and WVNO-FM, Mansfield, Ohio.[1] Ontario and Mansfield are entirely within the Grade A contour of WCOM(TV). The acquisition of control of radio and television facilities where the Grade A contour of the television station encompasses the entire community of license of an AM or FM station is generally prohibited by the one-to-a-market provisions of Section 73.3555(b) of the Commission's Rules. Accordingly, Mid-State has requested a waiver permitting common ownership based on the "failed station" exemption set forth in Note 7 of Section 73.3555.

3. In support of the waiver, the applicants state that, while WCOM(TV) commenced operation in February 1988, the station ceased operation in July 1989, due to dire financial problems and has remained dark since that time pursuant to Commission authorizations.[2] The financial problems, they assert, are a direct result of the station's inability to obtain essential local cable carriage. In that regard the applicants state that 60% of the television households in the Mansfield area subscribe to cable. Having invested more than $5.6 million in the station to provide service to the Mansfield area, the applicants point out that the cable "must carry rules" were rescinded just as WCOM(TV) began operating. They also note that after spending 1 1/2 years to obtain carriage on cable systems within WCOM(TV)'s coverage area, the station was ultimately carried on systems only providing service to approximately 10% of the cable subscribers in the area. Thus, while WCOM(TV) is the only authorized local television service in Mansfield, they note that the station must compete with many other television stations, including those in Columbus and Cleveland, which are carried by these cable systems, as well as those available off-the-air.[3] Thus, the applicants claim that WCOM(TV) was essentially invisible to the majority of the viewers in the coverage area.

4. Additionally, the applicants state that Com III has vigorously sought to return the station to the air. Such efforts, they aver, included an extensive search for buyers, mergers or new funding from investers or lenders. The applicants assert that, although the WCOM(TV) facility has been shown to numerous potential buyers, every initiative has failed because of the cable carriage problem and because Mansfield is located geographically between Columbus and Cleveland, Ohio, and receives service from numerous television stations. Thus, they maintain that a grant of the assignment application would result in prompt resumption of service, permit substantial economies of scale and cost savings, and allow Mid-State and its related stations to expand their local programming efforts and to consolidate their studios, staff and transmission facilities. In addition, MidState claims that the proposed modification of WCOM(TV)'s facilities (*i.e.*, relocation of

[1] In addition, Mid-State is the licensee of low power television station W50BE, located in Mansfield, Ohio.

[2] The applicants note that the staff's March 2, 1992, letter granting Com III's request for extension of the authority to remain silent, cautioned that future requests for authority to remain dark would carry a heavy burden with respect to Com III's efforts to restore service to the Mansfield community. The staff's letter also stated that Com III was expected to take substantial steps to return the station to the air or to submit an application to assign the license to a party that would do so. The instant application was filed three weeks later on March 20, 1992.

[3] We note that the 1989 to 1990 *Arbitron Television Markets and Rating Guide* lists WCOM(TV) as part of the Cleveland market (ranked 11th), which is served by numerous television stations. The 1991 list did not include WCOM(TV) since the station has been off the air since June 1989.

the antenna to the tower now utilized by its low power television station) would result in further cost savings in excess of $650,000.

5. The applicants further claim that a grant of the waiver would not result in any undue concentration of the media in the Mansfield area because the area is well served by numerous other media outlets (*i.e.*, 5 AM, 9 FM, and 4 television stations; daily newspapers published in Mansfield, Shelby, Cleveland, and Columbus; and cable systems serving 60% of the television households in the Mansfield area). Moreover, they assert that grant of the waiver would enhance diversity of media voices by resuming the operations of Mansfield's only local television station.

PETITION TO DENY

6. Petitioner states that, although WCOM(TV) qualifies as a "failed station" under the Commission's definition, this fact does not automatically entitle Mid-State to a grant of the waiver here. It maintains that Com III has not submitted any specific information regarding its efforts to sell the station to an entity which would not require a waiver of the Commission's multiple ownership rules. Petitioner asserts that it has no reason to believe that the station was not offered for sale, but speculates that if it were placed on the open market for $75,000, which is the price specified here, there would be a number of interested buyers who would not require a waiver of the Commission's Rules. Therefore, it argues that the circumstances presented here require the Commission to seek further explanation of other attempts by Com III to sell the station at a comparable price before waiving its multiple ownership rules under the "failed station" exemption.

7. Further, Petitioner states that if the subject applications were to be granted, Mid-State and its principals would control four (*i.e.*, WCOM(TV), WRGM(AM), WVNO-FM, and W50BE, a low-power television station in Mansfield, Ohio) of the six commercial broadcast stations licensed to Mansfield and Ontario. Thus, it contends that, with that amount of local and regional control, Mid-State could control advertising rates and the programming in that area. Noting the recently adopted relaxed multiple ownership rules governing radio stations,[4] Petitioner asserts that a single entity could not have an attributable interest in more than one-half of the radio stations in a market. Here, it states, Mid-State would have an attributable interest in two-thirds of the total commercial broadcast stations licensed to Mansfield and its environs.

8. Moreover, Petitioner speculates that Mid-State intends to operate WCOM(TV) as little more than a LPTV station similar to W50BE, which it presently operates in Mansfield. Finally, Petitioner argues alternatively, that the public interest would be better served by denying the captioned applications and reserving the WCOM(TV) spectrum for use in connection with our Advanced Television (ATV) system proceeding.

OPPOSITION

9. Mid-State asserts that Petitioner is attempting to apply the more rigorous case-by-case review to the request here, and to reallocate to the applicants the burden the Petitioner has to rebut the presumption (*i.e.*, that joint ownership of a "failed station" is beneficial to the public). In addition, Mid-State maintains that while only six stations are licensed to Ontario and Mansfield, there are 21 broadcast outlets that serve the area,[5] and that approval of the proposed assignment would not result in Mid-State being a dominant broadcast licensee in the area.[6] In regard to Petitioner's assertions concerning other potential buyers, it states that WCOM(TV) is an extremely high-risk investment for anyone not already in the market. Moreover, Mid-State asserts, Com III has made repeated good faith efforts to sell WCOM(TV) at any price throughout the license term as specified in its extension requests; however, Com III found that securing a creditworthy buyer, other than Mid-State, was impossible.[7]

10. Additionally, Mid-State asserts that the ATV system Freeze Order nowhere contemplates removal of a spectrum currently licensed to a television station. *See Advanced Television Systems,* 52 Fed. Reg. 28,346 (July 29, 1987). Further, concerning Petitioner's contentions that it intends to operate WCOM(TV) as little more than a LPTV station, Mid-State states that it proposes to construct a facility which will utilize 294 kW at 180 meters height above average terrain serving over 425,000 persons. It also notes that it plans to implement an ambitious local programming proposal with a substantial amount of local news, public affairs, and children's programming.[8]

DISCUSSION

11. In *Amendment of Section 73.3555,* 4 FCC Rcd 1741, *reconsidered in part,* 4 FCC Rcd 6489 (1989), we set out standards for reviewing requests for waivers of the one-to-a-market rule. We concluded that we would look favor-

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[4] *Revision of Radio Rules and Policies,* 7 FCC Rcd 2755 (1992).

[5] Mid-State notes that the 21 stations serving the area are licensed to the communities of Mansfield, Ashland, Columbus, Cleveland, Crestline, Galion, Fredericktown, Willard, Shelby, Mount Vernon, and Lexington, Ohio.

[6] Mid-States believes that the Commission should be aware that in addition to controlling an AM and FM radio combination in Ashland, Ohio, Petitioner controls LPTV station W59BP, Ashland, Ohio. It points out that the LPTV's facilities are co-located with Petitioner's radio stations and that W59BP's advertising time is offered in combination with Petitioner's radio outlets.

[7] Com III points out that Mid-State is a qualified buyer that will pay cash for the assignment of WCOM(TV)'s license, certain equipment and intangible assets. It notes that other equipment will be sold separately to an unspecified party, yielding an aggregate consideration several times the price being paid by Mid-State for a portion of the assets.

[8] In its opposition, Mid-State also maintains that Petitioner has mischaracterized and distorted relevant facts concerning its proposal and that the petition to deny is a strike pleading filed for the primary purpose of delay in order to obstruct reactivation of a competing media outlet. *State College Communications Corp.,* 58 FCC 2d 462, 465-66 (1976); *Radio Carrollton,* 69 FCC 2d 1139 (1978). We have carefully reviewed the matters complained of by Mid-State and find no misstatements or concealment of material facts. Nor can we conclude on the basis of the information before us that the arguments proffered by Petitioner are frivolous or that the subject petition was filed for the primary purpose of delay. Thus, we need not consider this matter further.

ably upon waiver requests involving ownership of stations that have been off-the-air for at least four months or are in bankruptcy. In adopting Note 7, we stated that we were predisposed toward granting such waivers which would allow a station that has been off-the-air for a substantial period to resume service or allow a station that is involved in bankruptcy to continue or resume operation. We also determined that joint ownership would not adversely affect our goals of diversity and competition under these circumstances. We concluded that, once a station ceased operation or became involved in bankruptcy, competition and diversity could not be improved by forbidding joint ownership, and that dark or bankrupt stations disserve those goals because they do not furnish service to the community. *Id.* at 1752-53.

12. Here, Petitioner has raised no public interest arguments outside of the waiver request, and we believe that the applicants have affirmatively demonstrated that a waiver permitting common ownership of the subject stations pursuant to the "failed station" exemption is appropriate. Petitioner acknowledges that the assignment application meets the "failed station" standard adopted by the Commission. As we noted when we adopted the "failed station" standard, silent stations are not consistent with the public interest because they do not provide service. Petitioner has not challenged or attempted to show how this determination is inapplicable here. Rather, Petitioner has attempted to apply here the Commission's case-by-case review standard, which requires that attempts to sell the station be made before a waiver will be considered. Even if such a showing were required, it appears that Com III has attempted to sell WCOM(TV) to other buyers, but to no avail. In fact, during the time the station has been silent, the licensee has kept the Commission informed regarding the problems it has encountered in attempting to activate the station or to find a buyer that would.[9] In extending WCOM(TV)'s authorization to remain silent, the staff found the licensee's efforts to have been adequate. We agree with the staff and are not persuaded by the arguments advanced by the Petitioner that Com III's sales efforts have been anything other than reasonable.

13. In addition, we do not believe our desire to foster ATV service warrants denial of the requested waiver. The Commission's objective in the freeze order was the preservation of unoccupied frequencies for possible future ATV use. It was not intended in anyway to restrict the transfer or use of licensed facilities. In fact, the freeze order specifically stated that the freeze did not apply to existing facilities or to changes in them. *See Advanced Television System*, above.

14. Finally, we do not believe that the media holdings of MidState create an undue concentration of the media in the Mansfield area. In that respect, while only one full-service television station is licensed to Mansfield, the Mansfield area receives Grade B service from three off-the-air television stations located in Cleveland (all of which are VHF and network affiliated) and receives Grade B service from two off-the-air television stations located in Columbus (both of which are VHF stations and affiliated with NBC or Fox). In addition, substantial portions of the area encompassed by WCOM(TV)'s licensed and proposed Grade B contour also receive numerous Grade B or better service from stations licensed to Cleveland, Columbus, Toledo, Sandusky, and Newark, Ohio. Further, as noted by the applicants, there are numerous radio stations available in the area and heavy cable penetration.[10] Based on facts set out above, we find that a grant of this assignment application is in the public interest and is consistent with *Amendment of Section 73.3555*, 4 FCC Rcd 1741 (1989).

CONCLUSION

15. Accordingly, IT IS ORDERED, That the petition to deny filed by Ashland Broadcasting Corporation, IS DENIED.

16. IT IS FURTHER ORDERED, That the request for waiver of the Commission's one-to-a-market rule, Section 73.3555(b), IS GRANTED; and having found the applicants fully qualified, the above-captioned application for consent to the assignment of the license of station WCOM(TV), channel 68, Mansfield, Ohio, from Com III TV, Inc., to Mid-State Television, Inc., IS GRANTED.[11]

17. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the parties to this proceeding by Certified Mail - Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] In his Declaration, the president of Com III states that over the past three years, the Park National Bank (WCOM(TV)'s major creditor) has placed thousands of dollars of advertisements in major trade publications, and has sent mass mailings to television owners, applicants, brokers and engineers in attempting to find a buyer. He asserts that the bank only received one specific offer from an interested party which ultimately failed because of a lack of financing. Additionally, letters to the staff from Com III requesting authority to remain dark noted that several potential purchasers had expressed an interest in the station including an Ohio-based minority-controlled broadcast group, a local religious organization, and certain of the original Com III shareholders. However, negotiations were unsuccessful because of the potential purchasers' concerns about their inability to obtain cable carriage and/or their inability to arrange financing.

[10] For example, there are five radio stations licensed to Mansfield, three commercial and two noncommercial, WMAN(AM), WHYT(FM), WOSV(FM) (noncommercial educational), WVMC(FM) (noncommercial educational), and WVNO-FM. The latter is licensed to the proposed buyer. Additionally, four commercial radio stations from nearby cities provide 1 mV/m or better service to Mansfield. These stations are: WNCO-FM, Ashland; WAPQ-FM, Crestline; WQLX(FM), Galion; and WRGM(AM), Ontario, which is also licensed to the buyer.

[11] Contrary to the Petitioner's contention, we do not believe that the proposed modification, which will provide service to more than 425,000 persons, is substandard. The contingent application for modification of WCOM(TV)'s facilities is awaiting interference coordination with Canada and will be acted upon separately by the staff when and if Canadian clearance is obtained.

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: WCOM (TV), Mansfield, Ohio; One-to-a-market Waiver.

In this proceeding the Commission grants waiver of the one-to-a-market rule[1] based on the "failed station" presumption.[2] I do not question the fact that WCOM (TV) meets the test for a failed station. The station has been off the air for at least four months and appears to be in financial trouble.[3] I concur because of my concern that the Commission continues to consider the full impact upon diversity and competition even in situations involving failed stations.[4]

When the Commission determined that it would "look favorably" upon waiver requests involving ownership of stations that have not been operational for a substantial period of time or stations that are involved in bankruptcy proceedings, it did not indicate that this waiver would be "automatic." A presumption that grant of a one-to-a-market waiver request is in the public interest is merely a weighing in favor of the grant. The Commission still must consider whether other public interest factors outweigh the grant. In this regard, I believe the Commission must ensure that such waivers do not negatively impact upon diversity of ownership. I understand that, in general, in situations involving failed stations the Commission has presumptively made a determination that benefits to the public would outweigh any costs to diversity. However, where evidence is submitted that clearly demonstrates from an economic perspective that grant of the waiver could, in fact, substantially detract from the diversity and competitive goals, the Commission should weigh this factor in its determination.[5]

The question as to whether there exists undue concentration of the media in the Mansfield area is a close one.[6] Mid-State Television will own two of the seven commercial radio stations in the Mansfield market.[7] While it will own the only full service television station in Mansfield, there are five full service television stations that provide Grade B service in the market and heavy cable penetration.[8] In light of the fact that this case involves a failed station and that there will be numerous other separately owned broadcast facilities in the market[9] I will concur with the result reached in this proceeding.

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[1] 47 C.F.R. §73.3555.

[2] *See Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989) (*Second Order*).

[3] See Memorandum Opinion and Order at ¶12.

[4] *See, e.g.*, Dissenting Statement of Commissioner Andrew C. Barrett (KEZV (FM), Spearfish, South Dakota; One-to-a-market Waiver) adopted March 16, 1992.

[5] *See generally* Concurring Statement of Commissioner James H. Quello, *Memorandum Opinion and Order* in MM Docket No. 87-68 (elimination of *Carroll* doctrine recon.), 4 FCC Rcd 2276-78 (1989).

[6] In fact, under the case by case approach used for transactions not involving either the top 25 or the failed station presumption, I am not certain that the applicant could have made a sufficient showing that grant of waiver would further the public interest.

[7] *See* Memorandum Opinion and Order at ¶14, note 10.

[8] *Id.* at ¶14.

[9] Although I continue to be mainly concerned with the impact on the community of license, I am somewhat assuaged by the number of stations in surrounding communities. *See* Memorandum Opinion and Order at ¶15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

K-W TV, INC. File No. BMPCT-881202KM

For Modification of Construction Permit for Station WTVU(TV), New Haven, Connecticut

and

For Petition for Order to Show Cause

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992; Released: June 11, 1992

By the Commission:

1. The Commission has before it for consideration: (a) the above-captioned application of K-W TV, Inc. (K-W), permittee of unbuilt Station WTVU(TV) (IND), Channel 59, New Haven, Connecticut, for modification of its construction permit, and its accompanying request for waiver of Section 73.610(d) of the Commission's Rules relating to short spacing; (b) an objection filed by the Association of Maximum Service Telecasters, Inc. (MST); (c) a joint objection filed by Arch Communications, Inc. (Arch), licensee of Station WTIC-TV (FOX), Channel 61, Hartford, Connecticut,[1] and by WGBH Educational Foundation (WGBH), licensee of Station WGBY-TV (PBS), Channel 57, Springfield, Massachusetts; and (d) related pleadings. We also have before us K-W's Petition for an Order to Show Cause, requesting enforcement of the "unique site" rule, Section 73.635 of our Rules.

THE SHORT SPACING WAIVER REQUEST

2. K-W seeks modification of its construction permit to specify a new site for its proposed Channel 59 operation at the West Peak of the Hanging Hills in Meriden, Connecticut (Meriden Mountain). Pursuant to Section 73.610(d) of the Commission's Rules, a station operating on Channel 59 must maintain a minimum separation of 19.5 miles (31.4 kilometers) from a station operating on Channel 61 in order to prevent intermodulation interference. However, K-W's proposed site is 9.7 miles from the site of Station WTIC-TV, Channel 61, making its proposed site 9.8 miles short spaced. Accordingly, K-W seeks a waiver of Section 73.610(d).

3. In support of its request for waiver, K-W asserts that, after the Commission authorized construction at its current site in North Branford, Connecticut, the site owner (the New Haven Water Company) subsequently refused to make the location available to the permittee on any terms. K-W maintains that, in its effort to locate its antenna, it looked at 17 potential sites, which it has labelled Sites 1 through 17. The permittee contends that the Commission's spacing requirements, the Federal Aviation Administration's airspace restraints, and local zoning ordinances and environmental concerns served as obstacles to locating an "acceptable" new site. K-W states that, unable to find a suitable site, it concluded that it had only three options: (1) implement a channel exchange with Station WEDW(TV), Channel 49, Bridgeport, Connecticut; (2) colocate with Station WTNH(TV), New Haven, Connecticut; or (3) pursue a short-spaced site at Meriden Mountain and seek waiver of Section 73.610(d). The applicant claims that Connecticut Public Broadcasting, Inc., licensee of WEDW(TV), has no interest in a channel exchange. In addition, K-W maintains that Cook Inlet Communications Corporation (Cook Inlet), licensee of WTNH(TV), has refused to allow K-W to colocate at the site which it owns and operates.[2] Consequently, K-W alleges, it has no choice but to pursue the Meriden Mountain site. Only from Meriden Mountain, the applicant contends, can it operate with technical facilities even reasonably comparable to those of other television stations in the Hartford-New Haven market.

4. The proposed site was selected, K-W states, because it is the only site that will allow the area-wide coverage necessary for its survival. K-W asserts that "substantial technical facilities [allowing coverage of most of the Hartford-New Haven market]... will enhance the prospects for a competitive, economically viable operation on Channel 59." The permittee cites four factors which it claims mandate such facilities: (1) the terrain of the market is characterized by rugged ridges and deep valleys, negatively affecting signal propagation; (2) the market's population is configured around several distinct cities, arranged "more or less" in a straight line, while still being considered as one market; (3) WTVU(TV) would operate in the upper portion of the UHF band, resulting in inherent propagation limitations; and (4) K-W would be competing with at least six other commercial stations in the market.[3] Consequently, the applicant argues, grant of the waiver request is critical to the proposed station's economic viability.

5. In its objection to the short spacing proposal, MST asserts that K-W's underlying premise, that it must serve all of the Hartford-New Haven market, is an irrelevant private economic and business objective, rather than a public interest objective. MST states that channels are assigned to communities, not markets, citing *Satellite Out-*

[1] Arch reorganized after it filed its pleadings in this case and, following Commission approval of a *pro forma* application, assigned the WTIC-TV license to a new, commonly controlled entity, Channel 61 Licensee Corporation. For ease of reference, however, we shall retain the name "Arch" to identify this petitioner.

[2] This is the basis of K-W's Show Cause petition, which we discuss at Paragraphs 15-19, below.

[3] According to the *1992 Television and Cable Factbook*, seven commercial television stations are currently licensed in the Hartford-New Haven market. Stations WFSB(TV) (CBS), WHCT-TV (IND, off-the-air), and WTIC-TV (FOX) are licensed to Hartford. WTNH(TV) (ABC) is licensed to New Haven and Hartford, and WVIT(TV) (NBC) is licensed to New Britain and Hartford. The market also includes WTWS(TV) (IND), New London, and WTXX(TV) (IND), Waterbury.

reach Ministries, Inc., 47 RR 2d 1381, 1383 (1980); and, because Channel 59 is allotted only to New Haven, K-W need not be able to serve Hartford, as well. MST contends that K-W's coverage precondition for site suitability leaves open the question of whether K-W has met its threshold burden of demonstrating the unavailability of fully spaced sites.

6. Arch and WGBH argue that K-W's rejection of Sites 14-16 because they would not allow coverage comparable with that of other stations in the Hartford-New Haven market is a completely self-imposed coverage condition and does not relieve K-W of compliance with the spacing requirements. They contend that K-W has not demonstrated that the station's economic survival depends on providing service to Hartford; such service, they claim, is desired purely for the applicant's private economic interests. The petitioners add that the Commission encourages competitive facilities where possible, but only when it can be achieved consistent with the basic allotment scheme, citing *Cowles Florida Broadcasting, Inc.*, 60 FCC 2d 372, 388 (1976), *recon. denied*, 62 FCC 2d 953 (1977) (Commission denied application to allow a station licensed to Daytona, Florida, to modify its facilities to cover Orlando, which would have made it short spaced). The joint petitioners note that Section 73.606(b) of the Commission's Rules allots Channel 59 to New Haven, rather than to Hartford. Therefore, they argue, K-W's desire to serve Hartford does not justify its rejection of fully spaced sites from which it could serve New Haven, its community of license. *See Satellite Outreach*, at 1383; *Edens*, at 693.[4]

7. In reply, K-W states that it requires substantial technical facilities for economic viability and argues that *Cowles* is distinguishable from the instant proposal. There, K-W asserts, the applicant made no showing that fully spaced sites were unavailable, focusing instead on the desirability of the proposed move for competitive parity. To the contrary, K-W contends, Channel 59's viability depends on its ability to cover most of the Hartford-New Haven market, as the permittee attempts to activate the market's seventh commercial station on a high UHF channel in an area with rugged terrain. In the alternative, K-W maintains that the Commission, in *Caloosa Television Corporation*, 3 FCC Rcd 3656 (1988), *recon. denied*, 4 FCC Rcd 4762 (1989), signalled its willingness to grant short-spacing waivers to stations which seek them not for economic survival, but merely to end their economic disadvantage.

DISCUSSION

8. The Television Table of Allotments was established so that stations in a given community could operate with maximum power and antenna height without creating objectionable interference to neighboring stations. To maintain the integrity of the Table, it was necessary to establish minimum mileage separations and to allow only limited deviations from those separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the Rule. In the past, factors we have evaluated when acting on such waiver requests have included: (1) the unsuitability of the existing site, if any, in terms of the economic viability of the station, in technical terms, or in a licensee's inability to reach areas containing a significant number of viewers who lack service, a network service, or "independent" service; *see Roy H. Park Broadcasting, Inc.*, 45 RR 2d 1083 (B/c. Bur. 1972); and *WSET, Inc.*, 80 FCC 2d 233 (1980); (2) the magnitude of the short spacing; *compare Clay Broadcasting Corp.*, 50 RR 2d 1273, *recon. denied*, 51 RR 2d 916 (1982) (approval of a 5-mile shortfall out of 190 required) *with West Michigan Telecasters, Inc.*, 22 FCC 2d 943, *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, 460 F.2d 883 (D.C. Cir. 1972) (denial of 15-mile shortfall out of 170 required); (3) the nature and extent of any predicted loss of service that would result from a grant of the short spacing; *see Roy H. Park Broadcasting, Inc., supra;* and *Blair Broadcasting of California, Inc.*, 55 RR 2d 619 (MMB 1984); (4) the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area; *see Roy H. Park Broadcasting, Inc., supra;* (5) the concerns, if any, expressed by the licensee(s) to which short spacing would result; *see WSET, Inc., supra;* and *Blair Broadcasting of California, Inc., supra;* (6) the extent to which the licensee obtained its license knowing there were spacing restraints imposed in a rule making proceeding; *see Townsend Broadcasting Corporation*, 62 FCC 2d 511 (1976); and *WLCY-TV, Inc.*, 16 FCC 2d 506 (Rev. Bd. 1969), *review denied*, 25 FCC 2d 832 (1970); and (7) whatever technical proposal an applicant makes to reduce or eliminate objectionable interference; *see Caloosa Television Corporation*, above.

9. *Site Availability* Before we can consider the public interest arguments that may support a waiver request, the threshold question is whether no fully spaced sites are available. *Townsend*, at 512. This requirement has been interpreted as requiring an applicant to demonstrate that less short-spaced sites also are unavailable. *See Edens Broadcasting, Inc.*, 2 FCC Rcd 689, 693 (Rev. Bd. 1987). We must therefore initially address whether K-W has met its threshold pleading burden.

10. From our review of the showing submitted, we are not persuaded that K-W has demonstrated the unavailability of fully spaced sites in the New Haven area. First, by its own admission, K-W selected a site designed to cover the entire Hartford-New Haven market. While such an objective is laudable, it must be accomplished within the parameters of our rules and policies, unless a sufficient public interest justification is established for departing from the rules. We note that the greater the deviation from the Rules, the higher the burden on the applicant to show that the public interest will be served by a waiver. *See WAIT Radio v. F.C.C.*, 418 F.2d 1153 (1969). Here, the permittee's waiver request involves a short spacing of approximately 50%, far greater than we have allowed in the past. It appears that sites are available which would provide principal community coverage to New Haven. However, many of these sites were rejected because K-W asserts that its economic survival depends on its ability also to serve Hartford and the remainder of the Hartford-New

[4] Arch and WGBH add that K-W's rejection of colocation with WTNH(TV) is also self-imposed. They argue that because the Commission has not yet ruled on the Petition for an Order to Show Cause, K-W cannot assert that the site is unavailable. However, we address the merits of K-W's Show Cause petition in Paragraphs 15-19, below.

Haven market. That conclusion is not supported by market studies or other documentary information, but solely by K-W's own speculation. Further, it appears that K-W would be able to provide Grade B service or better to Hartford from some of the sites rejected.

11. K-W's reliance upon *Caloosa* in support of its request does not rebut its insufficient showing. In *Caloosa,* we did allow an operating station to change its transmitter from a fully spaced site to a short-spaced one. However, the 3.5% short spacing involved in *Caloosa* was well within the range we have granted; we have never before allowed a 50% short spacing. In addition, the applicant in *Caloosa* demonstrated an unusual combination of public interest factors supportive of a grant. Among those factors were: the natural barriers to alternative sites posed by the Gulf of Mexico and extensive swamp areas; the gain in service to more than 60,000 people over the existing service; the provision of the first off-the-air ABC network service to more than 34,000 people; improved coverage for another station which planned to colocate at the applicant's planned tower; and the lack of objection from the only party to which interference would theoretically be caused, once the applicant agreed to install and operate precision frequency control equipment. *Id.,* at 3657-58. We note that none of these factors is present in the instant proposal. K-W faces no natural barriers comparable to those discussed in *Caloosa.* Also, K-W proposes no new service to an area without service or to an underserved area. In fact, Hartford currently receives Grade B signals from eight commercial stations.[5] Moreover, while the applicant in *Caloosa* proposed to share its new tower with another station, thereby allowing the latter to upgrade its facilities, no other station will similarly benefit from grant of K-W's proposal. Finally, unlike *Caloosa,* the affected licensee, WGBH, vigorously opposes the proposal based on interference.

12. Our conclusion in this case is also consistent with our recent decision in *Sarkes Tarzian, Inc.,* 6 FCC Rcd 2465 (1991), in which we granted a waiver request, allowing a licensee to relocate from a fully spaced site to one that was short-spaced. We emphasized that "an applicant's desire to serve other communities outside its city of license, standing alone, would not support a waiver of the minimum spacing requirements. However, when acting upon requests for short-spacing waivers, the Commission considers several factors... and each request stands on its particular facts".*Id.* at 2467. In that case, the applicant made a persuasive showing of public interest benefits justifying the waiver. Critical to that showing was the provision of additional service to underserved areas; notably, the proposed operation would provide off-the-air national network programming (CBS) for the first time to over 40,000 people, supplying that service to the state's capital and fastest growing metropolitan area for the first time. K-W, to the contrary, has demonstrated no service gains to an underserved area. Moreover, K-W has not demonstrated any unusual circumstances which compel us to waive our Rules.[6]

13. *Interference* Even if K-W could meet the threshold showing regarding the lack of fully spaced sites, the proposal would still be rejected because K-W has failed to establish the absence of interference. First, it must be emphasized that the proposed deviation is not minor: the applicant seeks a 9.8 mile waiver of a 19.5 mile standard. Moreover, the greater the deviation from the requirements of the Rule, the higher the burden placed on those seeking waivers. *See Townsend,* above. We cannot conclude from our review of K-W's proposal that it has established the absence of serious interference to operation on Channel 57. Indeed, a contrary result is likely. The nature of the interference involved is not created by two signals causing interference to one another. Rather, the signals from stations operating on Channels 59 and 61 will intermodulate (or mix) within television receivers so as to interfere with the reception of other channels - Channel 57, in this case. None of the parties disputes the fact that there would be a substantial area where interference would occur within the Grade B contour of WGBY-TV (Channel 57). However, while K-W asserts that at least 5 of the overlap area is shadowed and that WGBY-TV's actual service is limited, its assertion is not supported by sufficient data for us to conclude that no loss of service would take place. Even if we accept K-W's allegation that 5 of the area is shadowed, almost half of the viewers in the overlap area could nevertheless experience interference to their reception of the WGBY-TV signal. In fact, it appears that the interference area within WGBY-TV's Grade B contour is likely to be somewhat greater than the 132 sq. km alleged by K-W; Arch and WGBH allege that it would be 603 sq. km and contain 495,000 people. Additionally, we are not persuaded by K-W's proposal to utilize filters to eliminate any interference. We agree with Arch and WGBH that, unless it is a close case, the use of filters is not the most practical solution to intermodulation interference. This is true because receiver susceptibility to intermodulation interference varies over a wide range; therefore, viewers typically cannot determine the source of such interference, and it would be impractical for K-W independently to locate viewers that experience a reduction in the quality of their reception. These practical problems with filters make their use an unworkable remedy for a situation such as the one here where we believe interference is likely to occur. Notwithstanding its willingness to utilize filters, K-W has not demonstrated its ability to use them effectively, nor has it adequately demonstrated that the number of viewers likely to be affected by interference is minimal. Thus, because K-W has not adequately demonstrated that interference to the reception of WGBY-TV's signal is not likely to occur, we must reject the waiver request.[7]

14. *Conclusion* We find that K-W has not met its threshold burden of adequately demonstrating the unavailability of other fully spaced sites. In fact, it appears that several

[5] These include all six operating commercial stations in the Hartford-New Haven market, *see* note 3, as well as Stations WGGB-TV (ABC), Springfield-Holyoke, Massachusetts, and WWLP(TV) (NBC), Springfield, Massachusetts.

[6] K-W also argues that our decision in *WSET, Inc.,* 80 FCC 2d 233 (1980), compels us to accept its proposal. However, we distinguish that case from the proposal before us. *WSET* involved the application of an existing station to relocate its tower from a short-spaced site to a less-short-spaced site. In addition, grant of the waiver request allowed a significant number of people to receive national network programming (ABC) for the first time. Further, grant of the request allowed the licensee substantially to reduce shadowing in its community of license.

[7] K-W states that the market is heavily cabled, but it fails to establish what percentage of cable penetration exists in the area it asserts would be subject to potential interference.

sites are available from which the permittee could provide principal community coverage to New Haven without any short spacing impediments. K-W has rejected those sites solely because they would not allow the coverage it seeks of the entire Hartford-New Haven market. In addition, we note that K-W has not adequately demonstrated noninterference to the reception of WGBY-TV's signal. We therefore deny its request for waiver of Section 73.610(d) of the Commission's Rules.[8]

PETITION FOR ORDER TO SHOW CAUSE

15. K-W also filed a Petition for Order to Show Cause, requesting the Commission to order the licensee of Station WTNH(TV), New Haven, Connecticut to show cause why it should not be directed to comply with Section 73.635 of the Commission's Rules by negotiating in good faith with K-W the terms and conditions under which they could colocate at the site owned by the licensee of WTNH(TV). Cook Inlet, the current licensee,[9] has opposed the petition. While K-W has expressed a preference for the Meriden Mountain site, our disposition of the short-spacing issue requires us to address the merits of the instant petition.

DISCUSSION

16. Section 73.635, the "unique site" rule, states that

> [n]o television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations.

47 C.F.R. Sec. 73.635. We must ascertain whether Cook Inlet has an obligation under the Rule to provide K-W with access to its tower.

17. While the parties disagree over the applicability of the first two components of the Rule, they pay little attention to the third element, which we consider to be critical in determining the nature of Cook Inlet's obligations to other television broadcasters. The Rule makes clear that its purpose is to remove unnecessary impediments to competition, ensuring that the public will have access to a variety of differing broadcast sources. We cannot impose upon Cook Inlet an obligation under Section 73.635, unless its exclusive use of its site "would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations." *Id.* As the Commission stated in 1981 in declining to revise Section 73.635 to compel the sharing of common antenna sites by VHF and UHF permittees and licensees:

> we believe that our current restriction [Section 73.635] strikes the proper balance between the exercise of a licensee's business judgment and the Commission's responsibility to regulate the broadcast industry in the public interest. That is, we would intrude in this area only in situations where the exclusive use of a unique site results in limitations of service to the public.

Common Use of TV Towers, 49 RR 2d 482, at 484 (1981).

18. As we noted above, several fully spaced sites are available from which K-W could serve New Haven. Consequently, whether Cook Inlet chooses to colocate with K-W has no effect on K-W's ability to fulfill its obligation to serve its community of license. Moreover, New Haven is not an underserved area. Indeed, much of K-W's waiver request rests upon the fundamental contention that Hartford-New Haven is a highly competitive market. *See* Paragraphs 3-4, above. The substantial number of television broadcasters already operating in the market substantiates that thesis: the market is served by six commercial television stations.[10] Because the other five commercial stations broadcast from sites other than that controlled by Cook Inlet, their operations continue independently of whether Cook Inlet shares its tower.

19. For the above reasons, we conclude that Cook Inlet's exclusive use of its site will not unduly limit the number of television stations that can be authorized in the New Haven or Hartford areas and will not unduly restrict competition among area television stations. Consequently, we find that Section 73.635 imposes no obligation on Cook Inlet to share tower space with K-W.

CONCLUSION

20. Accordingly, IT IS ORDERED that the objections filed by Arch Communications, Inc., the Association of Maximum Service Telecasters, Inc., Channel 61 Licensee Corporation, and WGBH Educational Foundation, ARE GRANTED.

21. IT IS FURTHER ORDERED that the application of K-W TV, Inc. for modification of its construction permit for station WTVU(TV), New Haven, Connecticut, IS DENIED.[11]

22. IT IS FURTHER ORDERED that the Petition for an Order to Show Cause filed by K-W TV, Inc. IS DENIED.

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[8] We remind the permittee that the basic allotment scheme has built-in competitive disadvantages, and that any permittee undertakes operation with knowledge of the basic allotment scheme. *See Cowles*, at 388.

[9] Two months after K-W submitted its Petition for an Order to Show Cause, the Commission authorized the assignment of the license from the original licensee, Capital Cities Communications, Inc., to Cook Inlet. K-W had filed a petition to deny the assignment application, based on its earlier Show Cause petition. We took no action on the Show Cause petition at that time, because of Cook Inlet's explicit representation that it would give serious consideration to K-W's colocation proposals. *Capital Cities Communications, Inc.*, 59 RR 2d 451, at 470 (1985). K-W filed a supplement to its Show Cause petition on March 10, 1987, after Cook Inlet became the licensee. Over a period of time, the parties negotiated and could not reach a settlement.

[10] *See* note 3.

[11] In view of our action here, K-W will be afforded a period of six months from the date of the release of this decision to find a suitable site that complies with the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Chesapeake and Potomac
Telephone Company

Petition for Waiver of the
Common Carrier Bureau's
Letter of Interpretation
Dated August 21, 1991

AAD 91-48

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1992; **Released: June 11, 1992**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 27, 1991, the Chesapeake and Potomac Telephone Company (C&P) filed a petition for waiver of the Bureau's Letter of Interpretation dated August 21, 1991.[1] The *Letter of Interpretation* clarified that direct assignment is to be used in the jurisdictional separations process only to the extent that Sections 36.101 through 36.741 of the Commission's rules specifically allow for it.[2] C&P now requests that the *Letter of Interpretation* be waived to permit C&P to continue using an alternative method, which it believes to be direct assignment, for the separation of trunk testing expenses. We find that the C&P method is not direct assignment, and therefore the petition to waive the *Letter of Interpretation* is misplaced. Accordingly, we deny the C&P petition.

II. BACKGROUND

2. Jurisdictional separations is the process used by telecommunications companies to apportion their costs and revenues between the state and interstate jurisdictions. The separations procedures are set forth in Part 36 of the Commission's rules. Fundamentally, these rules require that the jurisdictional apportionment of costs be accomplished either through direct assignment or through the application of an appropriate relative use (or surrogate) factor.[3] Direct assignment identifies cost classifications or categories as wholly state or wholly interstate without the need to employ a relative use factor.

3. The petition for waiver concerns the apportionment of trunk testing expense, which is a part of Account 6530, Network Operations Expenses. The prescribed apportionment procedure for this account is in Section 36.353 of the Commission's rules[4] which states: ".... The expenses in this account are apportioned among the operations based on the separations of Account 2210, Central Office Switching, Account 2220, Operator Systems, Account 2230, Central Office Transmission, Account 2310, Information Origination and Termination, and Account 2410, Cable and Wire Facilities, combined."

III. PETITION AND PLEADINGS

4. C&P petitions to waive the Bureau's *Letter of Interpretation* so C&P may continue to substitute what it terms a direct assignment methodology for the prescribed apportionment procedure when separating trunk testing expense.[5] C&P asserts that this methodology was allowed under a previous waiver,[6] but that that waiver was terminated by the *Letter of Interpretation*. At the heart of C&P's petition are two fundamental arguments: (a) that its substitute allocation procedure constitutes direct assignment; and (b) that application of the prescribed rule would have unintended effects and would impose an undue burden on C&P ratepayers.

5. C&P describes its allocation procedure as follows: it uses technician time reports to isolate total trunk testing hours and to break these hours down among time spent testing switched access trunks, special access trunks, and other trunks. Costs for these three categories are then recorded separately in the company ledgers using appropriate rates per hour that include benefit expenses. The costs in each of these categories are then jurisdictionally separated based on the jurisdictional apportionment of the related trunk investment for Central Office Transmission Equipment and Cable and Wire Facilities. All remaining Network Operations Expenses, including subscriber loop testing expenses, become the fourth category, and are jurisdictionally separated by C&P using the Section 36.353 rule.[7]

6. In support of its assertion that its allocation of trunk testing expense is direct assignment, C&P states that direct assignment can take one of two forms: a jurisdictional assignment of a cost based on its account identification, or a more complex procedure using cost averaging and/or allocation. C&P states that it is using the latter, more complex, direct assignment approach for trunk testing expense. In its *December 20 Letter*, C&P cites three Part 36

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[1] Clarification of the Role of Direct Assignment in the Jurisdictional Separations Process, Letter of Interpretation, 6 FCC Rcd 5068 (Com.Car.Bur. 1991) (*Letter of Interpretation*).

[2] 47 C.F.R. §§36.1 *et seq.* (1990). Sections 36.1 and 36.2 contain the general guidelines for the separations rules. Sections 36.101 through 36.741 contain the specific separations procedures to be used to categorize and apportion each category of cost and revenue.

[3] 47 C.F.R. §36.1(c) (1990).

[4] 47 C.F.R. §36.353 (1990).

[5] C&P supplements its petition with five *ex parte* letters filed by its parent corporation, Bell Atlantic. These letters are all from Joe Mulieri, Director, FCC Relations, Bell Atlantic, to various members of the Bureau's Accounting and Audits Division. These letters are dated and referenced as follows: December 20, 1991, (*December 20 Letter*); December 31, 1991, (*December 31 Letter*); January 27, 1992, (*January 27 Letter*); January 29, 1992, (*January 29 Letter*); and February 10, 1992, (*February 10 Letter*).

[6] C&P Petition at 1, n.1, *citing* Annual 1988 Access Tariff Filing Petitions for Waiver, 2 FCC Rcd 5659 (Com.Car.Bur. 1987).

[7] *See December 20 Letter* at 3.

rules[8] which set forth what C&P regards as direct assignment procedures. Then C&P describes the methodology used for one of the three, Interexchange Circuit Equipment, which is included in Section 36.126(e)(3) of the Commission's rules, and concludes that its methodology for trunk testing expense is analogous to and consistent with this rule.

7. C&P also argues that the allocation procedure set forth in the Commission's rules for trunk testing expenses is inappropriate for the District of Columbia, and that its use of an alternative approach is thus justified. C&P states that the District of Columbia jurisdiction is unique, especially regarding the concentration of trunks and interstate private line services.[9] C&P states that, because of these unique circumstances, the allocation process contained in the Commission's rules yields inaccurate results. C&P claims that the Section 36.353 allocation process takes no account of the actual services benefiting from trunk testing activities in the District of Columbia, where those services are disproportionately interstate. C&P states that by substituting its procedure for the procedure in the rules, it is able to increase the interstate assignment for trunk testing expense from 34 percent to 63 percent, thereby shifting $4.2 million to interstate operations, where C&P says the costs belong.

8. Three parties, the District of Columbia Public Service Commission (D.C. PSC), Southern New England Telephone Company (SNET), and Frederick and Warinner, filed comments on the C&P Petition for Waiver.[10] These parties support the C&P petition for waiver, and D.C. PSC agrees with C&P's statements concerning the uniqueness of its service area. D.C. PSC claims that C&P's methodology uses direct assignment to the extent feasible, adding that the Separations Manual does not contemplate "pure direct assignment."

IV. DISCUSSION

9. We do not agree that the C&P procedure constitutes direct assignment. The initial step in the procedure, *i.e.*, the use of technician hours classified by type of trunks tested, provides for the assignment of expenses into categories, none of which can be directly assigned to a single jurisdiction. The actual jurisdictional separation is then accomplished by apportioning the expenses in each category through the application of a surrogate relative use factor, and not through direct assignment. The allocation procedure used by C&P thus does not constitute direct assignment and therefore is not affected by the *Letter of Interpretation*.

10. We are not persuaded that the C&P procedure is analogous to or consistent with Section 36.126(e)(3) for Interexchange Circuit Equipment. In this rule, four subcategories of costs are created. The costs in the first subcategory are all assigned to the interstate jurisdiction, the costs in the second subcategory are all assigned to the state jurisdiction, and the remaining two subcategories are apportioned based on allocation factors. The costs in the first two subcategories (and only those costs) are described in the rule as being "directly assigned." By contrast, at no point in the C&P procedures for allocating trunk testing expenses is any category or subcategory of costs assigned to a single jurisdiction. All subcategories in the C&P procedure are apportioned using an allocation factor, and therefore the procedure is not analogous to that contained in Section 36.126(e)(3).

11. Rather than denying C&P's request solely on the basis that it is not direct assignment, however, we will consider C&P's arguments as if they were made in support of a petition for waiver of the applicable rule, Section 36.353, for allocating trunk testing expenses. The Commission has a strong presumption that all of its rules are valid; thus, to justify a waiver of Section 36.353, C&P would need to show that the prescribed procedure produces unintended effects and undue burden.

12. C&P claims that the prescribed rule produces inaccurate separations results, because its District of Columbia operations are unique. While we might characterize C&P's operations as atypical in some respects, we do not agree that the separations rules produce an unreasonable result for C&P. The costs in question, trunk testing expenses, account for only 22 percent of C&P's Network Operations Expenses.[11] The remaining 78 percent are other types of network expenses reflecting the costs associated with power, engineering, network administration, and plant operations administration. However, all these expenses are directly related to the operation of the network, and the use of the prescribed allocator, also based on network plant, is particularly appropriate. The Joint Board also expressed this view in its *Recommended Decision and Order*,[12] which specifically noted that there is a close relationship of Network Operations Expenses to investments in Central Office Equipment, Information Origination and Termination Equipment, and Cable and Wire Facilities.[13] The rule in question here was purposely written, in its

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[8] The three "direct assignment" rules cited by C&P are: Section 36.126(e)(3), which contains apportionment rules for All Other Interexchange Circuit Equipment; Section 36.152, which contains apportionment rules for Cable and Wire Facilities; and Section 36.377, which contains apportionment rules for Local Business Office Expense.

[9] C&P Petition at 2-3. C&P states that the District of Columbia has the highest proportion of multiline business customers and private line arrangements of any Tier 1 company in the nation; 67 percent of its access lines are multiline business and access lines subject to surcharge, compared to an industry average of 24 percent. (Tier 1 companies have annual revenues of over $100 million.) C&P also states that the District of Columbia has the highest proportion of trunks, measured in terms of investment in Cable and Wire Facilities; 33 percent of this investment is comprised of trunk investment, compared to an industry average of 12 percent. C&P states that its Special Access Plant is 9 percent of total plant, while the industry average is 3 percent.

[10] Two of these parties, D.C. PSC and Frederick and Warinner, also filed Applications for Review of the Bureau's *Letter of Interpretation;* SNET and several other parties filed comments in connection with these applications. The Commission will respond to the Applications for Review in a separate order.

[11] *See December 31 Letter* at 2.

[12] Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, Recommended Decision and Order, 2 FCC Rcd 2582 (1987) (*Recommended Decision and Order*).

[13] *Id.* at 2588.

current form, to provide a broad cost-causative allocator that would avoid the kind of special procedures that C&P now seeks to continue.

13. To the extent that C&P has atypical concentrations of trunks and private line services, this is reflected in the allocation of C&P's Network Operations Expense. This is so because the factor which is used to allocate this expense is derived from the jurisdictional allocation factors developed for C&P's network plant, including the plant used to provide its trunks and private line facilities. In fact, C&P's high concentrations of trunks and private line services may explain its high interstate allocation factor for Network Operations Expense, which, in 1990, was 34% compared with an average of 26% for all Tier 1 carriers.[14]

14. We also note that C&P's approach is conceptually unsound and produces distorted results. C&P has attempted to segregate small portions of a separations cost category and apply customized factors to these small portions while applying the prescribed allocation factor to the remainder of the category. This approach yields distorted results because the prescribed factor is designed to be applied to the entire category, not just the residual portion. Thus, even if the C&P approach arguably produces more precise results for the small portions of the category which it has segregated, it produces distorted results for the majority of the category (*i.e.*, the residual amount) and for the category as a whole. [15]

15. We are also not persuaded by C&P's argument that the shift of $4.2 million from interstate to state revenue requirements creates an undue burden. First, the state revenue requirement properly includes this amount. Second, the amount calculated by C&P is only 1.2 percent of C&P's total state revenue requirement. We do not believe that District of Columbia ratepayers will be unfairly or onerously burdened.

16. In conclusion, we find that the C&P procedure for apportioning trunk testing expenses between the jurisdictions is not direct assignment, but an alternative allocation method that is not authorized by our rules. We also find that the prescribed, rule for apportioning total Network Operations Expenses using a factor based on the total related network plant investment works for C&P as the Commission intended. Thus we find no rational basis for granting C&P's waiver request.

V. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to Sections 1.3, 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§1.3, 0.91, and 0.291, that the petition for waiver of the Common Carrier Bureau's *Letter of Interpretation* filed by the Chesapeake and Potomac Telephone Company on September 27, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[14] See the 1990 ARMIS 43-04 Reports of the Tier 1 carriers.

[15] In illustration, consider the following example: A carrier has a two story building which costs $100. It houses 20 employees all being paid equally, 10 of whom work on the first floor, 10 on the second floor. It decides to allocate the cost of the building between two services, A and B, based upon the wages of the personnel that work in the building. 75% of the employee wages are related to service A, and 25% to service B. Therefore, a logical allocation of the building cost would be $75 for service A, and $25 for service B. Assume that the same carrier prepared a detailed study and determined that all ten employees on the first floor work exclusively on service A and that the 75/25% split still reflects total wages of all employees in the building. (Note: in order for this to be true, half of the wages for second floor employees would be related to service A, and half to service B). If the carrier were to apply the customized allocation factor to allocate the first floor building cost (*i.e.*, 100% of $50 for service A) and the overall factor for the residual building cost (*i.e.*, 75% of $50 for service A), the resulting building cost allocation to service A would be $87.50, even though only 75% of the overall wages are associated with service A. Thus the overall building cost allocation would be distorted.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Central Telephone Company and	AAD 92-43
GTE Service Corporation	AAD 92-44
Requests for Extension of Time	
to File Reply Comments	

ORDER

Adopted: June 5, 1992; Released: June 5, 1992

By the Chief, Accounting and Audits Division, Common Carrier Bureau:

1. By this Order we grant Central Telephone Company (Centel) and GTE Service Corporation (GTE) an extension of time until June 22, 1992, to file responses to the comments filed on their respective Cost Allocation Manuals (CAMs).

2. In a Report and Order released December 20, 1991, *Computer III Remand Order*,[1] the Commission required Tier I local exchange carriers (LECs) and others subject to its jurisdiction to file quarterly updates to their CAMs or to notify the Commission that there had been no change in those manuals.[2] On April 24, 1992, the Commission released a Public Notice which listed those carriers who had filed revisions to their CAMs and established a pleading cycle for those interested in commenting on the revisions.[3] The Public Notice set May 22, 1992 for the filing of comments and June 8, 1992 for reply comments. The Public Notice also listed those companies that had not filed revisions to their CAMs for the quarter ending March 31, 1992. Centel and GTE were among those companies. Nevertheless, the Public Staff of the North Carolina Utilities Commission (NCUC) filed comments on Centel's CAM and the NCUC and the Tennessee Public Service Commission filed comments on GTE's CAM.

3. Centel and GTE state that since they did not file any revisions to their CAMs, they anticipated that they would not be required to respond to any comments and, therefore, made no provision to be ready to prepare responses. Centel states further that its staff responsible for the preparation of and compliance with its CAM have previous commitments, including work in connection with a state rate case, which will require their absence from the office during the remainder of the period allowed for preparation of the response. Centel states, in addition, that because of Memorial Day, May 25, 1992, it did not receive the comments on its CAM until May 26, 1992. Both Centel and GTE believe an extension would serve the public interest because it would provide the Commission with more complete records on which to evaluate whether the challenged CAM provisions comply with the Commission's rules. Centel states that counsel for the NCUC has consented to the grant of its request.

4. It is not the Commission's practice to grant motions for extension of time routinely. However, we will permit both Centel and GTE an extension of time until June 22, 1992. We believe that it is in the public interest to evaluate the issues in these cases based on full records. An extension of two weeks will not prejudice any party. In addition, we are assigning file number AAD 92-43 for the Centel proceeding and file number AAD 92-44 for the GTE proceeding.

5. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules and the authority delegated by Section 0.291 of the Commission Rules, 47 C.F.R. §§ 1.46, 0.291, that the Requests for Extension of Time filed by Central Telephone Company and GTE Service Corporation ARE GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

[1] Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, *Report and Order*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*Compuer III Remand Order*).

[2] 47 C.F.R. § 64.903.

[3] Public Notice, Carriers File Revisions to their Cost Allocation Manuals, 7 FCC Rcd 2590 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Presco Corporation — File No. 11932-CM-P-83
File No. 12015-CM-P-83

For Authority to Construct and Operate
Multichannel Multipoint Distribution
Service Station on F-group Channels at
Charleston, West Virginia
and Mansfield, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 12, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced applications of Presco Corporation (Presco) to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the F-group channels to serve the Charleston, West Virginia and Mansfield, Ohio areas were selected for qualification review as the result of Commission lotteries. The Committee for Fair MDS Lotteries (Committee) filed post-lottery Petitions to Deny,[1] challenging the application. Presco filed Replies to the Petitions to Deny.

2. *Pleadings.* In its Petitions, the Committee alleges that Presco, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Charleston and Mansfield. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill, and the similarities in technical and other information among the applications, and the Letter of Understanding between Presco and Bruce Merrill,[4] should lead the Commission to conclude that Presco failed to disclose the identity of the real-party-in-interest to its applications in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a). In addition, the Committee alleges these same facts demonstrate that Presco filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. Sec. 21.901(d)(2), also known as the one-to-a-market rule.

3. In its Charleston Reply, Presco relies upon the replies it filed in response to petitions to deny filed against its Boston, Mansfield, and Nashville applications. Presco's Charleston Reply at 2-3.

4. *Discussion.* The Court of Appeals for the District of Columbia Circuit has clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC,* 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont); Gencom, Inc. v. FCC,* 832 F.2d 171 (D.C. Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. Sec. 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. Sec. 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz).*

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC,* 857 F.2d 1556 (D.C. Cir. 1988)(hereinafter cited as *Astroline).* In the instant cases, the Committee alleges the apparent existence of real-party-in-interest rule and one-to-a-market rule violations. After consideration of the Committee's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject applications would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.,* 857 F.2d at 1563, 1573; *see also Midland Educational Broadcasting Foundation,* 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Presco failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See e.g., David Laustsen and Broadcast Data Corp.,* 3 FCC Rcd 2053 (Comm. Car. Bur. 1988)(hereinafter cited as *Laustsen);*

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[1] In its Petitions to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.,* 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI).*

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, and Wireless Services, Inc.

[3] The Committee asserts that Marshall M. Carpenter, Jr., as an employee of Bruce Merrill, instigated Presco's MMDS application submission. Committee's Charleston Petition at 5-6.

[4] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications (MerrillCom), will provide programming services to Presco, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

KIST Corp., 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. Sec. 309(d)(1), we now reach the question of the substantiality[5] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The Committee's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[6] therefore, we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[7] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[8] The Committee's allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were, filed.[9] The Committee argues that Bruce Merrill, acting through Merrill Communications, "has utilized multiple strawmen in an effort to secure benefits that would not have been available had [Bruce Merrill] filed in [his] own name." Committee's Charleston Petition at 6-7. However, in support of Presco's claim that there were no violations of these rules, Presco relies upon affidavits.

> The facts contained in those affidavits and the legal precedent set forth in the Boston Reply establish beyond question that MerrillCom has never had any rights to own or control any of the applicant's MMDS facilities, is not a real party in interest to any of the applications....

Presco's Charleston Reply at 2. The Committee's allegations with regard to Presco's violations of the one-to-a-market and real-party-in-interest rules are not unique to Presco's Charleston and Mansfield applications. These allegations were considered and rejected by the Commission in *VCI*, 2 FCC Rcd 1895 (1987). In light of Presco's rebuttal, we find the Committee's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest rule violations or one-to-a-market rule violations. *Id.; Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the Committee's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petitions to deny filed by the Committee will be denied.[10]

9. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries for the MMDS applications at Charleston and Mansfield of Presco Corporation ARE HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[5] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[6] The Committee argues that Bruce Merrill, through his company, MerrillCom, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Charleston and Mansfield. If true, there would exist violations of both of these rules. *Laustsen*, 3 FCC Rcd at 2054.

[7] Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[8] At the time Presco's Charleston and Mansfield applications were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[9] We note that the Committee failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). And, the Committee did not provide the amount of specific facts to substantiate its allegations. *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

[10] In *VCI*, 2 FCC RCD at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Presco "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." Presco is reminded that the Commission imposed in that order a condition on any MMDS authorization Presco obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days." During the 60 day period, [Presco] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

People's Choice TV, Inc. File No. 6506-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service Station on E-group channels at
San Francisco, California

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 12, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of People's Choice, Inc. (People's Choice) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the San Francisco, California area was selected for qualification review as the result of a Commission lottery. A post-lottery amendment was filed approximately one year after the lottery was conducted, concerning the potential for harmful interference to cochannel and adjacent-channel Instructional Television Fixed Service (ITFS) licensees. The Board of Trustees of The Leland Stanford Junior University (University), an ITFS licensee, filed an opposition to the grant of the application of People's Choice.

2. *Opposition.* University asserts that People's Choice must demonstrate *prior* to grant of its MMDS application a lack of harmful interference to the University's grandfathered cochannel Instructional Television Fixed Service (ITFS) stations, pursuant to 47 C.F.R. Sec. 21.902(i). According to the University, People's Choice "has not met the requirement imposed by Section 21.902(i) that prior to receiving a construction permit it demonstrate its proposed facility will not cause harmful interference to co-channel receive locations. In fact, it has shown the opposite. Under the Commission's Rules, [People's Choice], therefore, is not entitled to receive a construction" authorization. University's Response at 5.

3. *Reply.* In response, People's Choice states:

> [I]n an attempt to resolve the impasse which appears to exist between Stanford and [People's Choice], [our engineer] has reviewed the parties' earlier views and made a further effort to minimize the technical differences between the parties.... Taken together, [our engineer] believes that, in accordance with his interference analysis, these changes will eliminate potential harmful interference to all of Stanford's affected receive locations identified by [our engineer]. [Our engineer] also suggests that a combination of these techniques along with further analyses on beam tilting, beam shaping and antenna orientation will eliminate altogether even the potential harmful interference claimed by Stanford and denied by [People's Choice]....
>
> [People's Choice] will continue to work with Stanford to reach a common position on the likelihood of harmful interference and methods for dealing with it if such interference is indicated in the parties' revised calculations.

People's Choice Reply at 3-5. In addition, the applicant rebuts the University's argument "that it is entitled to actual protection, not calculated protection." According to the applicant, neither the rule nor the rulemaking order cited by the University "supports the proposition for which it is cited." People's Choice Reply at 4, n.3. Furthermore, if People's Choice "can show that, using the technical criteria and standards embodied in the rules, Stanford will not suffer interference, it has fully complied with the protection requirements." *Id.*

4. People's Choice also refutes two additional arguments presented by the University. "Contrary to Stanford's allegation, [People's Choice] does not need and does not seek a waiver of Section. 21.902(i). *See* Midwest Cable & Satellite, Inc., DA 86-218, *rel.* November 20, 1986. Nor is the interference issued presented by [People's Choice] operation at 100 watts relevant to [People's Choice] potential pending request for a construction [authorization to operate at] 10 watts." People's Choice Reply at 4, n.4.

5. *Discussion.* At the time the People's Choice MMDS application was filed, Section 21.902(i) imposed a duty on MMDS applicants to protect grandfathered E and F channel ITFS station licensees from harmful interference. At that time, 47 C.F.R. Sec. 21.902(i) stated as follows:

> All [MMDS] applicants... must, prior to receiving a construction [authorization] and at such time as the Commission requests, file with the Commission an analysis demonstrating that the facility to be constructed will not cause harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the transmitter, or in the alternative, submit a statement from the ITFS licensee that the interference is acceptable.

On October 11, 1990, the Commission eliminated this pre-authorization requirement and eliminated the entire rule provision. Commission rules now require that an MMDS applicant file ITFS interference analyses *after* the MMDS application is granted." MDS applicants for the E and F channels filing before October 11, 1990, must file the specified ITFS interference analysis and notification *after* a conditional license is granted, but before construction commences." *Report and Order, Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands,* 5 FCC Rcd 6410 n. 16 (1990)(hereinafter cited as *Wireless Cable Order)* (emphasis added); *see also Order on Reconsideration, id.,* 6 FCC Rcd 6764 (1991)(hereinafter cited as *Wireless Cable Reconsideration Order); Second Report and Order, id.,* 6 FCC 6792 (1991)(hereinafter cited as *Second Wireless Cable Order).* The application of People's Choice was filed prior to October 11, 1990. Thus, it is required to file an ITFS interference analysis *after* grant of its MMDS

application, and prior to commencement of construction. The MMDS application of People's Choice has not yet been granted. Consequently, the University's argument is premature.[1]

6. Although the University's opposition is now premature, we remind People's Choice that if its application is granted, it must file the ITFS interference analyses *prior to commencement of construction*. The analyses must demonstrate a lack of harmful interference to grandfathered ITFS stations within 50 miles of its proposed transmitter site, *and* it must serve a copy of the interference analysis on each affected ITFS entity, *or* it must file a consent statement from such an ITFS licensee or construction permittee, *or* it must submit the appropriate modification application for the ITFS entity. *Id.* at n. 16; *id.* at 6414-15; *Second Wireless Cable Order*, 6 FCC Rcd at 6798-99. *See also, Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6771-73. The University may then file a petition to deny challenging the interference analyses. People's Choice may not commence construction until it fulfills its specified duty with regard to protection from harmful interference of grandfathered ITFS stations within 50 miles "to the extent of their service that [was] either in the operation or application stage as of May 26, 1983." *Order on Reconsideration, Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 98 FCC 2d 129, 132-133. (1984).

7. These interference analyses must comply with the requirements at 47 C.F.R. Secs. 21.901 and 21.902. However, these rules require analyses based on theoretical calculations, not actual operation of the proposed MMDS station of People's Choice, and not on field testing. People's Choice demonstrates its understanding that, for some registered receiver sites, many different engineering techniques, such as, precision frequency offset operation, replacement of receiving antenna, with those of greater discrimination, shielding of the receive site, and limiting [People's Choice] transmitting power to below 100 watts, may need to be combined, in order to meet the theoretical standards required.

8. *Ordering Clause*. Accordingly, IT IS ORDERED that the opposition filed by The Board of Trustees of The Leland Stanford Junior University concerning the MMDS application of People's Choice TV Inc. at San Francisco, California IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] In addition, we note that, since the filing of the University's petition, several new rules have been implemented to facilitate the resolution of potential interference problems between licensed ITFS stations and MMDS entities. On October 11, 1990, the Commission adopted specific rule provisions concerning frequency offset and ITFS facility modifications by MMDS entities, including ITFS receiver equipment upgrades. *Wireless Cable Order*, 5 FCC Rcd at 6410-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

MTD Enterprises, Inc. File No. 9305-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on E-group channels at
Washington, D.C.

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 12, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of MTD Enterprises, Inc. (MTD) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Washington, D.C. area was selected for qualification review as the result of a Commission lottery. MTD filed a post-lottery major amendment, proposing to change its transmitter site. The University of Maryland at College Park (University) filed an opposition to the grant of MTD's application, as amended.

2. *Opposition.* The University asserts that MTD must demonstrate *prior* to grant of its application a lack of harmful interference to the University's grandfathered cochannel licensed Instructional Television Fixed Service (ITFS) stations pursuant to 47 C.F.R. Sec. 21.901(d)(1). "In summary, [MTD] cannot meet the requirements of Section 21.901(d) of the Commission's Rules, and therefore, may not construct its proposed MMDS facility either at the [initially proposed] location or at the [amended] location." University's Statement at 4.

3. *Discussion.* At the time MTD filed its MMDS application, Section 21.901(d)(1) imposed a duty with regard to protection from harmful interference of grandfathered ITFS stations on the MMDS construction authorization holder only *after* grant of its MMDS application and prior to commencement of construction.[1] As of January 25, 1991, the language of Section 21.901(d)(1) was revised. However, this revision did not change the timing of MTD's fulfillment of its duty imposed under Section 21.901(d)(1). "MDS applicants for the E and F channels filing before October 11, 1990, must file the specified ITFS interference analysis and notification *after* a conditional license is granted, but before construction commences."[2] MTD filed its MMDS application for Washington, D.C. prior to October 11, 1990. Thus, the duty imposed on MTD under Section 21.901(d)(1) attaches *after* grant of its MMDS application and prior to commencement of construction. MTD's MMDS application has not yet been granted.[3]

---

[1] At the time MTD filed its MMDS application, Section 21.901(d)(1) stated *inter alia* as follows:

> Frequencies in the band 2596-2644 MHz and associated response channels will be assigned only in accordance with the following conditions: (1)*Prior to commencing construction* of any facilities to use frequencies in this band [construction authorization holder] must submit to the Commission a written statement from all cochannel and adjacent channel Instructional Television Fixed Service Licensees ... with transmitters located within 50 miles of the [construction authorization holder's] transmitters that operation of the [construction authorization holder's] transmitter will not cause harmful interference to Instructional Television Fixed Service Operation or that the Instructional Television Fixed Service Licensee ... will accept whatever interference occurs....

(emphasis added.)

[2] *Report and Order, Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 6410 n.16 (1990)(hereinafter cited as *Wireless Cable Order)* (emphasis added); *see also Order on Reconsideration, id.*, 6 FCC Rcd 6764 (1991)(hereinafter cited as *Wireless Cable Reconsideration Order); Second Report and Order, id.*, 6 FCC 6792 (1991)(hereinafter cited as *Second Wireless Cable Order).*

[3] In addition, it should be noted that the Commission specifically rejected the principle advocated by the University in the original MMDS allocation order.

> Of course, we could require MDS applicants to include this analysis as a part of their applications. This would likely cause many existing and potential ITFS licensees to challenge the accuracy of the MDS applicant's analysis thereby involving the Commission staff in a series of contested proceedings. This would clearly delay the introduction of multichannel service in many areas.

Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203, 1236 (1983). Instead, the Commission chose to require the filing of an ITFS interference analysis or ITFS consent statement *after* grant of construction authority.

> The elements of this [reallocation] plan have several advantages that other plans lack.... It also creates at least the possibility that multichannel MDS will be available even in those areas where the reallocated channels are being used by ITFS service providers. It does this by granting conditioned construction [authorizations] for multichannel MDS in such areas and allowing the holders of these construction [authorizations] to negotiate with the existing cochannel and adjacent channel users to attempt to reach an accommodation whereby the requirements of both can be met....
>
> ... Under this plan, *an applicant is not required to conduct an interference analysis until after he has received an authorization.*

Id. at 1237-38 (emphasis added).

4. In addressing the University's concerns with regard to its ITFS point-to-point operations, we note that MTD may be able to file the requisite documents for ITFS migration. On October 11, 1990, the Commission decided that it would be possible for an MDS entity to displace grandfathered ITFS point-to-point operations if suitable alternative spectrum is available and if the MDS entity pays the expenses of the migration. *Wireless Cable Order*, 5 FCC Rcd at 6414-15.

5. Having carefully considered all of the pleadings and evidence submitted by the parties, we find that the University's opposition is premature. Section 21.901(d)(1) does not bar grant of MTD's MMDS application for Washington, D.C. We remind MTD, however, if its MMDS application is granted, it must file, *prior to commencement of construction*, an analysis with the Commission demonstrating a lack of harmful interference to grandfathered ITFS licensed stations within 50 miles of MTD's proposed transmitter site, *and* must serve a copy of the interference analysis on each affected ITFS licensee, *or* must file a consent statement from such an ITFS licensee, *or* must file the requisite documents for ITFS migration. *Id.* at n.16; *id.* at 6414-15; *Second Wireless Cable Order*, 6 FCC Rcd at 6798-99. *See also*, *Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6771-73. The University may submit a petition to deny concerning MTD's interference analyses *after* grant of MTD's MMDS application, if it receives a grant, and *after* MTD files the required interference analyses with the Commission. MTD may not commence construction until it fulfills its specified duty with regard to protection from harmful interference of grandfathered ITFS stations.

6. *Ordering Clause*. Accordingly, IT IS ORDERED that the opposition filed by The University of Maryland at College Park concerning the MMDS application of MTD Enterprises, Inc. at Washington, D.C. IS HEREBY DENIED. *See* 47 C.F.R. Secs. 1.4, 1.106 and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Charisma Telecasting Corporation — File No. 3109-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on E-group channels at Worcester, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 12, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Charisma Telecasting Corporation (Charisma) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Worcester, Massachusetts area was selected for qualification review as the result of a Commission lottery. Greater Media MDS, Inc. (Greater) filed a post-lottery Petition to Deny challenging the application, together with a Petition for Acceptance of Petition filed One Day Late (Acceptance Petition). Charisma filed an opposition.

2. *Pleadings.* In its Acceptance Petition, Greater admits its petition to deny was filed late. "Inadvertently... the [petition to deny] was omitted from the package of filings delivered to the Commission...." Acceptance Petition at 1. Greater argues, however, that "[t]he matter raised in the pleading, Charisma's financial capability, is statutory and qualifying in nature. The Commission is thus obliged to consider and weigh, *sua sponte*, the facts presented by the protest." Acceptance Petition at 2. In response, Charisma states as follows:

> Petitioner's explanation of why it failed to meet that clear deadline and instead filed its Petition to Deny three days later is essentially that it forgot to file the pleading with the Commission by the established deadline. Petitioner provides no Commission precedent, nor is Charisma aware of any, standing for the proposition that such a facile justification is sufficient to permit acceptance of a late-filed petition such as the subject pleading.

Opposition at 2.

3. We have carefully considered all of the pleadings and the evidence submitted by the parties. We agree with Charisma's analysis. After full consideration of the matter, the Commission adopted a very specific time limit for filing a post-lottery petition to deny of an MMDS application. "[W]e are amending our rules to provide that petitions to deny applications shall be filed within 30 days from the date of the public notice announcing the tentative selectees, as that date is defined in Sec. 1.4 of the rules." *MMDS Lottery Order,* 57 Rad. Reg. 2d 943, 953 (1985). *See* 47 C.F.R. Secs. 1.824(c) and 21.30(a)(4). We are not persuaded by Greater's arguments that its petition to deny should be accepted and considered despite its lateness.

4. However, we classify as an informal objection, pursuant to 47 C.F.R. Sec. 21.30(c), Greater's arguments that Charisma's MMDS application violates 47 C.F.R. Sec. 21.17 because it fails to demonstrate Charisma's financial qualifications. In rebuttal, Charisma asserts that its application adequately demonstrates its financial qualifications. We note that since Greater's pleading was filed, the Commission revised Section 21.17. "We conclude... that an attestation of the applicant's financial fitness is the most effective way of deterring speculative applicants without burdening the applicants and the Commission staff with addition detailed information." *Part 21 Revision Order,* 2 FCC Rcd 5713, 5719 (1987). Charisma's application is subject to this policy. *See id* at n.57. Charisma will be required to file a financial certification.

5. *Ordering Clause.* Accordingly, WE HEREBY DENY the Petition for Acceptance of Petition of Petition Filed One Day Late. IT IS ORDERED that the Petition to Deny filed by Greater Media MDS, Inc. of Charisma Telecasting Corporation's Worcester, Massachusetts MMDS application IS HEREBY DISMISSED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Jay Hobart Wilson File No. 16176-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on F-group channels at
Milwaukee, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: June 8, 1992; Released: June 12, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Jay Hobart Wilson (Wilson) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Milwaukee, Wisconsin area was selected for qualification review as the result of a Commission lottery. The Milwaukee Area District Board of Vocational, Technical and Adult Education (Board) filed a post-lottery Motion to Dismiss Wilson's application.

2. *Motion to Dismiss.* The Board argues that "Wilson has failed to prosecute his application and has made no serious attempt to cure deficiencies identified [by Commission staff] in several... requests for information. ...Nevertheless, [the] pendency [of Wilson application] is blocking the grant of [the Board's modification] application for [the Board's] co-channel ITFS station WHT-542 in Milwaukee." Board's Motion at 1.

3. *Discussion.* Contrary to the Board's assertion, it is not the pendency of Wilson's application which blocks the Board's modification application. Instead, grant of the Board's modification application is blocked by the Commission's determination in 1983 to prohibit ITFS modifications for grandfathered ITFS stations on the E or F group channels if the modification seeks a change of transmitter location.

In the *Report & Order*, we amended Rule 74.902(c), 47 C.F.R. Sec. 74.902(c)[,] to reflect the reallocation of the E and F channels; in so doing we specified that no new ITFS applications for these reallocated channels would be accepted after May 26, 1983. Grandfathered ITFS stations operating on the E and F channels will only be protected to the extent of their service that is either in the operation or application stage as of May 26, 1983. These licensees or applicants will not generally be permitted to change transmitter location or antenna height, or to change transmission power. In addition, any new receive stations added after May 26, 1983 will not be protected against interference from MDS transmissions. In this fashion, all facets of grandfathered ITFS operations were frozen as of May 26, 1983. No new ITFS applications will be accepted for these channels, including applications to add channels from the E or F groups by ITFS licensees or permittees with grandfathered rights to one or more of these channels. We noted that this prohibition is necessary to reserve the reallocated channels for MDS use, as well as to avoid having "mutually exclusive, fundamentally different applicants for the same channel." *Id.* at 1241.[1]

Despite the Board's claim, if we dismissed Wilson's application Commission rules provide that a second lottery would be held of MMDS applications filed for the F-group channels at Milwaukee, Wisconsin. *See Second Report and Order, id.*, 57 Rad. Reg. 943, 953-54 (1985).[2] As to the Board's claim that Wilson has failed to cure deficiencies in his application, these deficiencies will be considered during the qualification review of his application. *See* 47 C.F.R. Secs. 1.824 and 21.32.

4. *Conclusion.* Having carefully considered all of the pleadings and evidence submitted by the Board, IT IS ORDERED that the Motion to Dismiss filed by the Milwaukee Area District Board of Vocational, Technical and Adult Education concerning the MMDS application of Jay Hobart Wilson at Milwaukee, Wisconsin IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *Memorandum Opinion & Order on Reconsideration, Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 98 FCC 2d 129,132-33 (1984) (footnotes omitted.).

[2] To the extent the Board cites Section 21.30 which provides that post-lottery petitions to deny must be filed within 30 days of the public notice announcing the selection of an MMDS application by lottery, we note that the Board's "Motion to Dismiss" was filed approximately 51 months after the due date prescribed by Section 21.30.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. — File No. 14-DSS-STA-92

Application for Special Temporary Authority for the Galaxy I-R Domestic Fixed-Satellite

ORDER

Adopted: June 9, 1992; Released: June 12, 1992

By the Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has requested special temporary authority to operate its Galaxy I-R domestic fixed-satellite assigned to 133^0 W.L. at either 135^0 W.L. or 141^0 W.L. for an eight-week period, commencing upon launch, to test the satellite. GE American Communications, Inc. (GE Americom) filed a letter opposing this request. Alascom, Inc. (Alascom) filed a letter supporting GE Americom's comments. For the reasons discussed below, Hughes's request is granted.

2. Galaxy I-R has been authorized as a replacement for Hughes's Galaxy I satellite, which is operating at the 133^0 W.L. orbital location.[1] Hughes plans to launch Galaxy I-R in September 1992 and anticipates that Galaxy I will still be operating. Prior to commencing regular operation, Galaxy I-R needs to be tested. Hughes anticipates that this testing process will take approximately four to eight weeks. Hughes indicates that it would not be feasible to test Galaxy I-R at 133^0 W.L. while Galaxy I is still operating because it would cause service disruption to customers on Galaxy I.

3. Further, Hughes states that testing at 135^0 W.L. would not adversely affect the operation of GE Americom's Satcom C-1 satellite at 137^0 W.L. as the testing of Galaxy V-W at this location has already been coordinated with GE Americom[2] and no new issues are involved in the testing of Galaxy I-R. In the event that the 135^0 W.L. location is unavailable, Hughes has requested the alternate location of 141^0 W.L. and states that testing at this location would not adversely affect the Aurora II satellite located at 139^0 W.L. Hughes will promptly move the Galaxy I-R satellite to its assigned 133^0 W.L. location upon completion of testing.

4. In its opposition, GE Americom states that the 135^0 W.L. position will not be available for use by Hughes because GE Americom's Satcom C-4 satellite, which is authorized to operate at that location, will be launched in August 1992, one month prior to Galaxy I-R's scheduled launch date. In addition, GE Americom originally opposed the temporary use of 141^0 W.L. because of the potential harmful interference testing at this location could cause to the Aurora II satellite, jointly owned by GE Americom and Alascom. GE Americom suggested 143^0 W.L. as an alternate test location for the Galaxy I-R satellite.

5. In a letter dated April 15, 1992, Hughes indicates that 143^0 W.L. would not be feasible because Hughes's TT&C facility at Fillmore, CA could not "see" the Galaxy I-R satellite at that location. It states that this would pose an unacceptable risk to the control of the satellite.

6. Hughes also states that it met with GE Americom and has resolved potential interference problems which might be caused by operation at 141^0 W.L. As a result of these meetings, Hughes, GE Americom and Alascom have agreed on a plan to test the Galaxy I-R satellite at 141^0 W.L. Hughes has indicated that it will conduct its test according to the plan which was submitted with its April 15, 1992 letter.[3]

7. Granting the Hughes request will serve the public interest, convenience and necessity. Testing at 141^0 W.L. will allow Hughes to continue to provide service to its Galaxy I customers while insuring that the replacement satellite for Galaxy I is fully operational before it is placed into service. In addition, the parties have agreed to a plan that will assure that harmful interference does not occur. We therefore grant this request.

8. Accordingly, IT IS ORDERED that Application File No. 14-DSS-STA-92 IS GRANTED.

9. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to test Galaxy I-R at the 141^0 W.L. orbital location for an eight week period after the satellite is launched, in accordance with the test plan submitted on April 15, 1992. At the expiration of this period, Galaxy I-R must be moved to its regularly assigned location of 133^0 W.L.

10. IT IS FURTHER ORDERED that no harmful interference shall be caused to any other lawfully operated radio station and Hughes Communications Galaxy, Inc. shall cease operation immediately upon notification of interference.

11. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. shall notify the Commission in writing no later than seven days after the testing of Galaxy I-R is completed.

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[1] *See* Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988).

[2] *See* Hughes Communications Galaxy, Inc., 7 FCC Rcd 1297 (1992). *See also* Letters from Counsel, Hughes Communications Galaxy, Inc. (April 23, 1992 and May 13, 1992).

[3] Provided that Hughes adheres to the plan outlined in its April 15th letter, GE Americom has no objection to Hughes's use of 141^0 W.L. for testing purposes. *See* Letter from GE American Communications, Inc. to Chief, Satellite Radio Branch (May 8, 1992).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic
Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1992

PETITION FOR RULE MAKING FILED

Comment Date: July 2, 1992
Reply Comment Date: July 17, 1992

A petition for rule making filed on May 22, 1992, by Alcatel Network Systems, Inc. is being released today for public comment and designated RM-8004. The Petitioner proposes amendments to Parts 2, 21, 25 and 94 of the Commission's Rules to reallocate the 3.6-3.7, 3.7-4.2, 5.925-6.425, 6.525-6.875, 10.55-10.68 and 10.7-11.7 GHz bands to permit sharing by common carriers and private operational fixed microwave systems. The Petitioner also proposes amendments that for these bands would define licensee eligibility; prescribe channelization, minimum path lengths, minimum channel loading, and minimum capacity for bandwidth used; establish frequency coordination criteria; and establish antenna standards. Finally, the Petitioner references the relationship of its petition to proposals made by the Commission in its *Notice of Proposed Rule Making* in ET Docket No. 92-9, 7 FCC Rcd 1542 (1992), and to proposals made in a petition filed on March 31, 1992, by the Utilities Telecommunications Council, RM-7981.

Interested parties may file a statement in support of or in opposition to this petition, and reply to statements filed. RM-8004 must be referenced on the cover page of each statement or reply. Statements must be submitted by **July 2, 1992,** and replies to statements must be submitted by **July 17, 1992.**

The petition is available for inspection in the RM-8004 file at the FCC public reference room (Room 239), 1919 M Street, N.W., Washington, DC 20554. Copies of the petition also may be obtained from the Downtown Copy Center, (202) 452-1422. For further information, contact Tom Mooring, Office of Engineering and Technology, (202) 653-8114.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to
Encourage Innovation in the
Use of New Telecommunications
Technologies

Amendment of Parts 2, RM-7981
21, and 94 to Accommodate
Private Microwave Systems
in the 1.71-1.85 GHz
Band and in Bands Above 3 GHz

ORDER DENYING REQUEST TO DEFER COMMENT DATES

Adopted: June 4, 1992; Released: June 4, 1992

Comment Due Date: June 8, 1992
Reply Comment Due Date: June 23, 1992 for RM-7981
July 8, 1992 for ET Docket No. 92-9

By the Office of Engineering and Technology:

1. On May 11, 1992, Alcatel Network Systems, Inc. (Alcatel) petitioned the Commission to extend the pleading cycle for comments in the above-captioned proceedings from June 5 and July 6, 1992, for ET Docket No. 92-9; and June 1 and June 16, 1992, for RM-7981; to July 2 and July 17, 1992 (the deadlines for statements and reply statements on its petition, RM-8004 (filed on May 22, 1992)).

2. We note that pursuant to Section 1.46 of our Rules,[1] the comment deadlines for ET Docket No. 92-9 and RM-7981 have been automatically extended pending action on this request. By virtue of denying Alcatel's request today, comments in these two proceedings now are due on **June 8, 1992;** and the deadline for reply comments is extended to **June 23, 1992** for RM-7981 and to **July 8, 1992** for ET Docket No. 92-9.

3. Alcatel argues that unifying the pleading schedule for statements and replies on ET Docket No. 92-9, RM-7981, and RM-8004 would expedite, rather than delay, Commission action because it would result in a more complete and useful record by placing all relevant issues before the public for a single set of comments. The American Petroleum Institute (API) on May 21, 1992 filed a statement in support of Alcatel's request, arguing that establishing a unified filing schedule as requested by Alcatel would enhance the level of discussion on plans for reaccommodating displaced microwave users.

4. Personal Communications Network Services of New York, Inc. (PCNS-NY) filed an opposition to Alcatel's request on May 28, 1992. Noting that ET Docket No. 92-9 was adopted on January 16, 1992, and that the Commission already has extended the comment and reply period by over six weeks[2] at the request of API and others, PCNS-NY argues that a second extension of time is unwarranted and would delay further the introduction of emerging technologies such as PCS to the American people. PCNS-NY states that as the comment deadline approaches on the Notice of Proposed Rule Making in ET Docket No. 92-9, entities opposed to the Commission's proposal have chosen to file new requests for rule makings rather than address the issues in comments and replies on the Notice. This, argues PCNS-NY, threatens to result in a costly delay to the introduction to the American people of emerging technologies such as personal communications services.

5. The Commission does not routinely grant extensions of time.[3] We find that the comment periods for the above proceedings are reasonable. As PCNS-NY notes, on April 1, 1992, we extended an already generous comment period for comments and replies in ET Docket No. 92-9 by over six weeks. Thus without extending the comment deadline further, parties will have had over 16 weeks after release of the Notice to formulate their comments. The period for comments and replies established for RM-7981 is that prescribed by Section 1.405 of our rules.[4] Alcatel has argued that economies would be achieved by consolidating the filing deadlines in the above proceedings. I am concerned that such a step would result in unwarranted delay as well. On balance, I believe that the public interest would best be served by obtaining comment within the existing schedules. Accordingly, IT IS ORDERED, that the request to defer comment dates in these proceedings IS DENIED.

6. This action is taken pursuant to authority found in Sections 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 302, 303 (1988); and pursuant to Sections 0.31, 0.241 and 1.46 of the Commission's Rules, 47 C.F.R. § 0.31, 0.241 and 1.46 (1991). For further information contact Tom Mooring, Office of Engineering and Technology, (202) 653-8114.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

[1] 47 C.F.R. 1.46 (1991).
[2] See DA 92-398, released April 1, 1992.
[3] 47 C.F.R. 1.46 (1991).
[4] 47 C.F.R. 1.405 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 9, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEVADA BELL PETITION FOR WAIVER OF ONA TARIFFING ORDERS
CC Docket No. 89-79
CC Docket No. 88-2

On June 2, 1992, Nevada Bell filed a petition for waiver of the Commission's ONA tariffing orders in CC Docket Nos. 88-2 and 89-79, which require the BOCs to file federal tariffs for all of the basic service elements listed in their approved ONA plans. Nevada Bell requests that it be permitted to refrain from tariffing DID Trunk Queuing, claiming that it is technically infeasible for Nevada's switches to provide the service.

Interested parties should file comments on the petitions by **June 24, 1992,** and reply comments by **July 6, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-623
CC Docket No. 88-2,
Phase I

In the Matter of

US West Notice and Petition
for Removal of the Structural
Separation Requirement and
Request for Waiver of Certain
State Tariffing Requirements

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 1992; Released: June 9, 1992

By the Chief, Common Carrier Bureau:

1. On March 3, 1992, US West filed with the Commission a petition for structural relief, pursuant to the *BOC Safeguards Order*,[1] and a corresponding request for waiver of the open network architecture (ONA) state tariffing requirement for certain services. We find that US West has adequately demonstrated that a waiver of the state tariffing requirement is appropriate for each of the five ONA services it identifies. We also find, in view of our grant of its request for waiver, that US West has made the requisite showing for a grant of its petition for structural relief. Accordingly, we grant US West's petition.

2. In the *BOC Safeguards Order*, the Commission concluded that Bell Operating Company (BOC) provision of enhanced services pursuant to nonstructural safeguards would serve the public interest, and established conditions for the removal of the structural separation requirement for BOC provision of enhanced services. Each BOC must, as detailed in the *BOC Safeguards Order*, demonstrate that it: 1) has federal tariffs in effect for each of its initial interstate ONA services; 2) is technically prepared to offer each of its initial ONA services; and 3) has filed state tariffs for each of its initial ONA intrastate services.[2]

3. In its petition, US West certifies that, subject to the granting of its waiver request, it has taken all of the steps specified for initial ONA implementation.[3] US West seeks a waiver of the requirement that state tariffs be filed for five initial intrastate ONA services. US West claims that four of the services are intrastate equivalents of interstate services for which the Commission has already waived the federal tariffing requirement, and it argues that the Commission should waive the state tariffing requirement for the same reasons.[4] US West further argues that one additional service, Line Alert, should be exempted from the state tariffing requirement because it is not technically feasible today, and a reasonable substitute, "ScanAlert" is being offered.[5]

4. MCI opposes US West's petition and argues that it would be arbitrary and capricious for the Commission to grant structural relief while relying partly on the federal tariffs US West filed for initial ONA services, because the federal tariffs do not properly implement ONA goals.[6] MCI argues that interstate ONA tariffs do not provide access tariffs useful to interexchange carriers.[7] MCI further argues that US West's state tariffs undermine fundamental ONA objectives because the states are still developing ONA rules, particularly in the area of pricing. MCI asserts that US West's pricing practices for state-tariffed services may not be cost-based in some states.[8]

5. The American Newspaper Publishers Association (ANPA) also opposes US West's petition. ANPA argues that the three prerequisites to a grant of structural relief ignore the likely competitive harm from entry by the BOCs into the enhanced services marketplace on an integrated basis. Therefore, ANPA argues, the Commission should not grant structural relief until the BOCs are prevented from exploiting their local exchange monopoly in the enhanced services marketplace. ANPA further argues that the Commission should refrain from granting the petition until the *BOC Safeguards Order* is reviewed by the courts.[9]

6. We conclude that US West has adequately demonstrated that a waiver is appropriate for each of the five initial ONA services. We have already granted a waiver of the federal tariffing requirement for four of these services and find that the state tariffing requirement should be waived for the same reasons.[10] The state tariffing require-

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[1] *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*).

[2] *BOC Safeguards Order*, 6 FCC Rcd at 7624-7625 n.212.

[3] US West also states that it will begin restricting access to customer proprietary network information (CPNI) on June 20, 1992 for customers having more than 20 lines if no prior customer authorization to allow access to the CPNI has been obtained. US West Petition at 1-3.

[4] US West Request for Waiver at 1, citing *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for ONA; Filing and Review of ONA Plans*, Memorandum Opinion and Order, CC Docket Nos. 89-79 and 88-2, 7 FCC Rcd 811, 817 (1992) (*Federal Tariff Waiver*). The four services are Information Access, Automatic Circuit and Trunk Monitoring Service, Surrogate Client Number, and Tandem Routing.

[5] US West Request for Waiver at 4-5.

[6] MCI Comments at 2-4.

[7] MCI Comments at 4.

[8] MCI Comments at 5.

[9] ANPA Comments at 1-2.

[10] In the *Federal Tariff Waiver*, we granted US West waivers of the federal tariffing requirement for Surrogate Client Number, because it duplicates other services that US West already provides, and Automatic Circuit and Trunk Monitoring (ACTM), because of manufacturing and cost problems identified by US West. US West stated that it will attempt to provide ACTM through a mediated access gateway early in 1993. *Federal Tariff Waiver*, 7 FCC Rcd at 817.

ment for the remaining service, Line Alert, should also be waived because US West already offers similar capabilities, and has committed to offer Line Alert as soon as it becomes technically feasible. Accordingly, we grant US West's request for a waiver of the state tariffing requirement for Information Access, Automatic Circuit and Trunk Monitoring Service, Surrogate Client Number, Tandem Routing, and Line Alert.

7. Neither of the commenters in this proceeding has set forth any new substantive reasons why US West's petition should not be granted. Instead, the two commenters disagree with Commission policy on nonstructural safeguards and the effective implementation of ONA. In the *BOC Safeguards Order* and the *BOC ONA* proceeding, the Commission addressed arguments about the appropriateness of lifting the structural separation requirement (and the role of state tariffs in the ONA process.[11] This order merely implements the Commission's decision to substitute nonstructural safeguards for structural separation; it is not the proper forum for parties to reargue the merits of that Commission decision.

8. We therefore consider whether, in view of our grant of its request for a waiver, US West has made the requisite showing for structural relief. We conclude that it has. First, US West certifies that it is technically prepared to offer each of its initial ONA services consistent with its ONA plan or has received a waiver permitting it to delay offering the service. Second, US West certifies that it has effective federal tariffs for these services, or has received a waiver not to file federal tariffs for the service. Third, with the grant of its waiver request, US West has satisfied the requirement that it file state tariffs for its initial ONA services. We see no reason to take the unusual step of delaying our grant of US West's petition, as suggested by ANPA, until the courts have reviewed the *BOC Safeguards Order*. Accordingly, we grant US West's petition.

9. US West must continue to comply with the BOC ONA plan and reporting requirements established in the *BOC Safeguards* and *ONA* proceedings.[12] In the *BOC ONA Further Amendment Order*. the Commission required that the BOCs file further amendments and annual reports on their progress in implementing ONA.[13] In addition, in the *BOC Safeguards Order,* the Commission stated that it would review nonstructural safeguards after all the BOCs have operated under a full ONA environment for three years.[14] We grant US West's petition subject to these ongoing ONA requirements.

10. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. Sections 0.91 and 0.291, US West's Request for Waiver IS GRANTED.

11. IT IS FURTHER ORDERED, that US West's Petition for Removal of the Structural Separation Requirement IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

We also granted temporary waivers for Information Access and Tandem Routing. The waiver for Information Access was granted pending the resolution of a petition for declaratory ruling considering whether US West's gateway is a basic or enhanced service. We granted US West a temporary waiver of the federal tariffing requirement for Tandem Routing pending the resolution of the *Local Transport* proceeding, CC Docket No. 91-213. *Id.* We likewise today grant temporary waivers of the state tariffing requirement for those services pending resolution of those proceedings.

[11] *BOC Safeguards Order* 6 FCC Rcd at 29-30, 44-55; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 4 FCC Rcd 1, 162-171 (1988) (*BOC ONA Order); modified on reconsideration,* 5 FCC Rcd 3084 (1990) (*ONA Reconsideration Order);* 5 FCC Rcd 3103, 3112-3113 (1990) (*BOC ONA Amendment Order), Erratum,* 5 FCC Rcd at 4045, *pets. for recon. pending, pets. for rev. pending, California v. FCC* (9th Cir. No. 90-70336, filed July 5, 1990; 6 FCC Rcd 7646, 7663-7664 (1991) (*BOC ONA Further Amendment Order), pet. for rev. pending, MCI Telecommunications Corp. v. FCC and USA* (DC Cir. No. 92-1074, filed Feb. 19, 1992). In addition, the Commission has previously concluded that state tariffed ONA services need not be cost-based. *BOC ONA Order,* 4 FCC Rcd at 168.

The issues raised by MCI regarding federally tariffed ONA services are the subject of petitions for reconsideration and will be addressed in the *Part 69/ONA* proceeding. *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, 6 FCC Rcd 4524, 4531-4532 (1991), *pets. for recon. pending.*

[12] In the *BOC ONA Amendment Order,* the Commission required that BOC enhanced services operations must take the same access to certain BOC operations support systems (OSS) that BOCs provide to independent enhanced services providers once structural separation requirements are lifted. 5 FCC Rcd at 3108. Several BOCs have filed petitions for reconsideration and clarification of this requirement. We waive the same access to OSS requirement for US West pending a Commission decision on these petitions.

[13] *BOC ONA Further Amendment Order,* 6 FCC Rcd at 7649-7650, Appendix B.

[14] *BOC Safeguards Order,* 6 FCC Rcd at 7625.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 8, 1992

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Alexander, Lenora - Request for refund of hearing fee for a radio station in Strasburg, Colorado - **Granted** (May 15, 1992).

Lopez, Felix - Request for reinstatement of an application for a LPTV station in Fort Myers, Florida - **Denied** (May 20, 1992).

MAR-BOB-BEN - Request for refund of hearing fee for a radio station in Waynesboro, Pennsylvania - **Granted** (May 20, 1992).

Medley, Ms. Jerianne - Request for refund of the transfer fee for transfer of the license to radio station WOKJ(AM), Jackson, Mississippi - **Granted** (May 27, 1992).

New South Radio, Inc. - Request for partial reconsideration of fee determination as to filing fees for New South Radio, Inc - **Granted** (May 13, 1992).

Northwest Broadcasting Company - Request for refund of a filing fee for a FM station in Lake Geneva, Wisconsin - **Denied** (May 28, 1992).

P.M. Broadcast Engineering, Inc.- Request for clarification - **Decision** (May 27, 1992).

Pacific View Broadcasting - Request for refund of hearing fee for a radio station in Hilo, Hawaii - **Granted** (May 15, 1992).

Ruark, Robert H. - Request for reinstatement of an application for a LPTV station in Albany, New York - **Denied** (May 5, 1992).

U S WEST Communications, Inc. - Request for fee determination, waiver and partial fee refund - **Denied** (May 5, 1992).

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 15 1992

David Honig, Esq.
1800 N.W. 187th Street
Miami, Florida 33056

Dear Mr. Honig:

This is in response to your Request for Return of Hearing Fee (Request) submitted on behalf of Lenora Alexander (Alexander), the successful applicant for a new FM station at Strasburg, Colorado.

In support of your Request, you contend that Alexander demonstrates good cause for return of her hearing fee because, among other reasons, a comparative hearing was never held, and return of the fee would promote the Commission's policies favoring diversification of ownership of the mass media.

We find it unnecessary to address these issues as Alexander's hearing fee may be refunded on other grounds. In particular, the presiding ALJ's specific action deleting the environmental issue against Alexander's application, rather than ruling on her "Motion for Summary Decision" (which the ALJ dismissed as moot), brings this case within the purview of Section 1.1111(c)(1) of the rules, 47 C.F.R. § 1.1111(c)(1) (since amended in part and redesignated as 47 C.F.R. § 1.1111(c)(4)).

Accordingly, your Request is granted. A check for $6,760, payable to the applicant, will be forwarded to you at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 20 1992

Mr. Felix Lopez
1434 Alhambra Drive
Fort Myers, Florida 33901

Dear Mr. Lopez:

This is in response to your request for reinstatement, nunc pro tunc, of your application for a new Low Power Television Station (LPTV) at Fort Myers, Florida.

Your application was returned because no fee processing Form 155 accompanied the application. However, you state that your application should be accepted because the application package that you had received from the Commission did not contain a Form 155, all information requested on Form 155 was contained in your application except for the LPTV fee code, and sufficient time existed for you to cure this deficiency before the LPTV window closed if you had been promptly notified of the filing deficiency. Moreover, you state that the public will lose a valuable public service if your application is not accepted since grant of your license would have provided "an opportunity for minorities to be mainstreamed through LPTV educational training and cultural programming."

Every applicant is responsible for the completeness and timeliness of any filing with the Commission. Section 1.1107 of the Commission's rules states that every feeable application must be submitted with a Form 155 and that any application not accompanied by Form 155 will be dismissed. 47 C.F.R. § 1.1107. The Commission adopted the Form 155 requirement only after concluding that an anticipated threefold increase in applications made a fee form essential to efficient fee processing, notwithstanding the additional paperwork burden on the public. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Act of 1989, 5 FCC Rcd 3558, 3568-70 (1990), reconsidered in part, 6 FCC Rcd 5919 (1991). Moreover, early in the administration of the fee program, the Commission concluded that it lacked the authority to grant waivers in instances where its action would result in a de facto exemption of the fee requirements for a defined category of applicants, such as applicants intending to provide specialized programming. See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 961 (1987), reconsidered in part, 3 FCC Rcd 5987 (1988). Rather, the Commission determined that such waivers are within the sole purview of Congress. Id.

While we regret that you were unaware of the Form 155 requirement, you should understand that the Form is essential to timely and efficient fee processing of applications, and, consequently, speedy introduction of new services to the public. Absent strict adherence to the Form 155 filing requirement, including the requirement for inclusion of an appropriate fee code, the Commission could not manage the large and ever increasing volume of applications and fee payments it receives, and still hold its fee processing costs to a minimum.

Accordingly, your request is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 20 1992

Benjamin F. Thomas, Sr., Partner
MAR-BOB-BEN
P. O. Box 10
Greencastle, Pa. 17225

Dear Mr. Thomas:

This is in response to your request for refund of the hearing fee submitted by MAR-BOB-BEN in connection with its application for a minor change in the facilities of its station WEEO(AM), Waynesboro, Pennsylvania.

You state that MAR-BOB-BEN paid a hearing fee in anticipation of a comparative hearing with a mutually exclusive applicant, but it has now surrendered WEEO(AM)'s license to the Commission and withdrawn from the proceeding. Moreover, you state that no hearing designation order had been issued in this matter prior to MAR-BOB-BEN's withdrawal.

Section 1.1111(c)(2) provides that a hearing fee will be refunded whenever an applicant withdraws its application prior to its designation for hearing. 47 C.F.R. § 1.1111(c)(2).

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and made payable to MAR-BOB-BEN, will be forwarded to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAY 27 1992

OFFICE OF
MANAGING DIRECTOR

Mr. Gerald R. Proctor
The Proctor Group, Inc.
P.O. Box 5386
Galveston, Texas 77554-0386

Dear Mr. Proctor:

This is in response to your request for refund of the transfer fee submitted on behalf of Ms. Jerianne Medley (Medley), applicant for transfer of the license to radio station WOKJ(AM), Jackson, Mississippi.

You state that, at the time Medley tendered her application, she did not know the Commission was considering revocation of the license to that station. However, you also state that, since her submission, the Commission has in fact revoked the license of WOKJ(AM). You further recite that the license revocation involved Medley only incidentally and as an innocent third party. Consequently, you seek refund of her filing fee.

From the inception of the Fee Collection Program, the Commission has taken the position that, except in limited instances set forth in Section 1.1111 of our rules, "fees will be retained by the government irrespective of the substantive disposition of the underlying application." Establishment of a Fee Collection Program, 2 FCC Rcd 947 (1987), recon. granted in part, 3 FCC Rcd 5987 (1988). Although review of Section 1.1111 discloses no precise provision for a fee refund in the circumstances of this case, we conclude that Medley's situation is analogous to the conditions for refund set forth in Section 1.1111(a)(4). That section allows for return of fee when the Commission adopts new rules that would nullify or otherwise substantively affect an application that already has been accepted for filing. See 47 C.F.R. § 1.1111(a)(4). Although the Commission's action was predicated upon a revocation order, rather than the adoption of a rule, the ultimate result for Medley's application is the same.

Accordingly, your request for refund of the transfer fee is granted. A check for $565.00, payable to Ms. Jerianne Medley, will be mailed to the applicant at the earliest practicable time. If you have any questions about this refund, please call Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 13 1992

Peter Gutmann, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Gutmann:

This is in response to your request, filed on behalf of New South Radio, Inc. (New South), for partial reconsideration of a fee determination made by the Mass Media Bureau, FM Branch, regarding New South's application requesting a minor modification of its license to Channel 288C3.

By letter dated September 25, 1991, the Bureau dismissed New South's application and further noted that pursuant to Section 1.1104(2)(k) and Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558 (1989)(Fees II), the applicant was required to pay a fee of $1,565 for filing its Petition for Rulemaking for New Community of License or Higher Class Channel. Because New South did not pay this amount when it filed its application, the Bureau also imposed a 25% penalty charge on New South for filing its application with an insufficient fee. You submit that the fee determinations were in error because New South filed its rulemaking petition on May 16, 1990, prior to the effective date for Fees II (May 21, 1990), and therefore request reconsideration of that part of the Bureau's letter ruling.

The $1,565 rulemaking fee was part of a package of new and revised filing fees contained in the Omnibus Budget Reconciliation Act of 1989 (1989 Budget Act), Pub. L. No. 101-239, 101 Stat. 2106, codified at 47 U.S.C. § 158 (1989), signed into law on December 19, 1989. Effective May 21, 1990, the Commission adopted rule changes to implement the 1989 Budget Act (Fees II). After that date, applicants filing rulemaking petitions for changes in the community of license or channel class would be subject to the $1,565 rulemaking fee.

After careful review of the matter, we have determined that your request for partial reconsideration may be granted. Because New South filed its petition for rulemaking on May 16, 1990, prior to the effective date for the new fees set forth in Fees II, the Bureau's September 25, 1991 letter was incorrect with respect to

the fee insufficiency. Accordingly, New South does not have to pay the $1,565 rule making fee and the 25% late charge. A copy of our determination will be forwarded to the Mass Media Bureau, FM Branch. If you have any questions about this decision, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 3 1 1992

Michael H. Krafcisin, President
Northwest Broadcasting Company
P.O. Box 847
Barrington, Illinois 60011-0847

Dear Mr. Krafcisin:

This is in response to your request for refund of the $2,030 fee remitted to the Commission for filing an application for a new FM radio station at Lake Geneva, Wisconsin, on behalf of Northwest Broadcasting Company (Northwest).

You state that, in the course of prosecuting Northwest's application, you received only three pieces of correspondence from the Commission, one of which was a August 21, 1991 letter stating that your initial application was incomplete and consequently could not be processed. The letter indicated that your application and $6,760 hearing fee were returned to you on August 5, 1991. You maintain that your initial application (you specifically point to the hearing fee filing) was completed according to instructions, but you cannot understand what made the hearing fee filing incomplete.

In further support of your request for a refund of the application filing fee, you state that you never received any correspondence from the Commission advising you of the progress of processing your application. You also complain that, after the release of the Hearing Designation Order (HDO) dismissing your application, you were not served with an official copy of the HDO by the Commission, nor has your application been returned to you. Because you believe that you have received service that is not worth the $2,030 filing fee that you tendered with your application, you request a refund of this fee.

Your application was dismissed by the HDO in MM Docket No. 91-205, which was released July 30, 1991. We are unable to explain why you never received a copy of the HDO informing you that your application had been dismissed. Attached herewith is a copy from our records of the mailing list for the HDO to MM Docket No. 91-205, indicating that Northwest should have been mailed a copy of the HDO in this proceeding. Also attached herewith is a copy of the HDO.

With respect to your complaint that the Commission did not contact you regarding the progress of your application, you should be aware that there is no Commission policy to correspond with applicants over processing matters in the preliminary stages of a

comparative broadcast proceeding. See Public Notice on Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, 49 Fed. Reg. 47331 (December 3, 1984), recon. denied, Mimeo No. 35733 (released April 17, 1985).

Your application was considered incomplete (as outlined in the HDO) because your proposed facility was short-spaced to a nearby licensed FM station in violation of Section 73.213 of the rules, and there was no waiver request accompanying your application. As the HDO states, the failure to meet the minimum distance separation requirement was fatal to your application, and it was dismissed.

Your hearing fee was returned on August 5, 1991 because your application was incomplete and had been dismissed in the HDO. This was explained to you in the August 21, 1991 letter from this office; however, it appears that, without having received the the HDO, you did not understand what rendered your application incomplete and your hearing fee filing incapable of qualifying for processing (see also 47 C.F.R. § 1.1111(c)(2), providing for return of the hearing fee to an applicant that is dismissed by the HDO).

Although we regret that you feel you have received less than adequate service from the Commission, we are unable to return your processing fee. From the inception of the Fee Collection Program, the Commission has taken the position that, except in limited instances set forth in Section 1.1111 of our rules, "fees will be retained by the government irrespective of the substantive disposition of the underlying application." Establishment of a Fee Collection Program, 2 FCC Rcd 947 (1987), recon. granted in part, 3 FCC Rcd 5987 (1988).

Accordingly, your request for refund of your application fee is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

MAY 27 1992

OFFICE OF
MANAGING DIRECTOR

David M. Silverman, Esquire
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Second Floor
Washington, D.C. 20006-3458

Dear Mr. Silverman:

This is in response to your request made on behalf of P.M. Broadcast Engineering, Inc. (P.M.), licensee of station WQMR(FM), Federalsburg, Maryland for clarification of whether a hearing fee must be paid by an intervenor in a comparative hearing designated to select a broadcast licensee.

You state that P.M. Broadcasting (P.M.) intends to seek intervention in the comparative proceeding designated to select the licensee for a new FM station at Ocean City, Maryland. You further state that at least three of the applicants designated for hearing appear to be short-spaced with WQMR(FM) and, thus, could result in harmful interference to WQMR(FM) operations. See Hearing Designation Order in MM Docket No. 92-64, released April 13, 1992. You, therefore, contend that it would contravene the intent of Congress and that of the Commission to require P.M. to submit a hearing fee when its sole purpose in participating in the proceeding is to protect the quality of its signal.

In establishing its Fee Collection Program, the Commission generally imposed the fee requirement on those participants in a comparative proceeding requesting "a potentially valuable license", but excluded from the fee requirement those parties "where imposition of the fee would require a party to pay to defend itself." See Fee Collection Program, 2 FCC Rcd 947, 966 (1987), as modified, 3 FCC Rcd 5987 (1988). Consistent with this rationale, the Commission explicitly determined that intervenors, participating in a comparative proceeding pursuant to section 1.223 of the Commission's rules, would not be assessed a hearing fee. See 2 FCC Rcd at n. 134; see also 47 C.F.R. 1.223. Section 1.223 specifically recognizes that a licensee of an existing station, once it has met certain threshhold requirements, may intervene in a hearing in order to protect its station from possible interference from a proposed station.

Accordingly, we conclude that P.M. may participate in the comparative proceeding designated to select the licensee at Ocean City, without payment of a hearing fee, subsequent to a successful

demonstration of compliance with section 1.223. Moreover, we conclude that any party, qualified as an intervenor under section 1.223, may participate in a comparative broadcast proceeding without payment of a hearing fee.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 15 1992

Morton L. Berfield, Esquire
Cohen and Berfield, P.C.
Board of Trade Building
1129 20th Street, N.W.
Suite 507
Washington, D.C. 20036

Dear Mr. Berfield:

This is in response to your request for refund of the hearing fee submitted by Pacific View Broadcasting (Pacific) in connection with its application for a new FM station at Hilo, Hawaii.

You state that Pacific and the sole competing applicant for the station at Hilo filed a settlement agreement prior to the designation of their applications for hearing. The agreement provided, inter alia, for the award of the contested construction permit to the competing applicant and dismissal of Pacific's application. Further, you enclose a copy of a letter from the Mass Media Bureau approving the terms of the agreement and dismissing Pacific's application. See letter to Morton L. Berfield and John E. Fiorini, III from Dennis Williams, Chief FM Branch, dated February 4, 1991.

Section 1.1111(c)(2) provides for refund of a hearing fee whenever an application is dismissed prior to its designation for hearing. 47 C.F.R. § 1.1111(c)(2).

Accordingly, your request is granted. A check, drawn in the amount of $6,760.00 and payable to Pacific View Broadcasting, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 5 1992

Richard L. Vega, Jr., Esquire
Phase One Communications, Inc.
3452 Lake Lynda Drive, Suite 115
Orlando, Florida 32817

Dear Mr. Vega:

This is in response to your request for reinstatement, nunc pro nunc, of an application filed by Robert H. Ruark for a new LPTV station at Albany, New York.

Mr. Ruark's application was returned because the check that he submitted to cover his application fee was post-dated and, therefore, unacceptable as a fee payment. You state that Mr. Ruark entered the erroneous date on his post-dated check inadvertently. Moreover, you have enclosed a letter from Mr. Ruark's bank stating that it would honor the check, notwithstanding the erroneous date, and you note that four checks submitted by Mr. Ruark at the same time cleared Mr. Ruark's bank and their associated applications were accepted by the Commission. Finally, you contend that acceptance of Mr. Ruark's application will facilitate provision of community-originated programming in the Albany area.

Section 8 of the Communications Act provides that the Commission may dismiss any application for failure to pay a fee "in a timely manner." 47 U.S.C. § 158(c)(2). In this regard, the Commission decided that "all fees will be due in full upon submission of an application." See Establishment of a Fee Collection Program, 2 FCC Rcd 947, 954, recon denied, 3 FCC Rcd 3 FCC Rcd 5987 (1988). A post-dated check is not payable until the stated date, Uniform Commercial Code § 3-114(2), and, prior to the stated date it is not a "check" for purposes of the Uniform Commercial Code, as it is not payable on demand. Allied Color Corp. v. Manufacturers Hanover Trust Co. 484 F. Supp. 881 (S.D.N.Y. 1980). Thus, submission of a post dated check does not satisfy the Commission's requirement that the fee be paid with the submission of the application.

Similarly, an attempt to negotiate Mr. Ruark's post-dated check almost seven months before it was due would not be in conformance with normal banking procedures. We recognize that a paying bank, as Mr. Ruark's bank has now indicated, may honor a post-dated check under a private agreement with its customer. However, the Commission has determined that it will not undertake to mitigate an applicant's failure to make timely payment of a fee by attempting to negotiate a payment instrument before the date thereon and will not reinstate an application returned due to payment deficiencies because of the administrative costs attendant to such efforts.

Finally, we are satisfied that there is sufficient public interest in the Commission's consistent application of its fee requirements to override any temporary delay in the provision of service that adherence to the fee rules may require.

Accordingly, your request is denied, and I have, therefore, enclosed Mr. Ruark's check.

Sincerely,

for Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAY 5 1992

Lawrence E. Sarjeant, Esquire
U S WEST Communications, Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Dear Mr. Sarjeant:

This is in response to the request made by U S WEST Communications, Inc. (U S WEST) for a fee determination concerning 337 applications for pro forma transfer of control of radio licenses from The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company (NWB) and Pacific Northwest Bell Telephone Company (PNB) ultimately to U S West.

The U S WEST companies have submitted fee payments totaling $12,365.00 and U S WEST requests a reduction of the fees to $1,760.00 and a refund in the amount of $10,605. More specifically, U S WEST asks for a waiver of the requisite fees for (a) 113 Point-to-Point Microwave transfer applications filed by NWB, (b) 12 Public Land Mobile Radio transfer applications filed by NWB, (c) 140 Point-to-Point Microwave transfer applications filed by PNB, (d) 31 Public Land Mobile Radio license transfer applications filed by PNB, and (e) 7 Rural Radio license transfer applications filed by PNB. U S WEST contends that good cause exists for the requested waiver because the actual cost of processing the multiple pro forma applications will be considerably less than the fees specified in the Fee Schedule since only a minimal staff effort is required once the Commission acts on the various "lead" applications. In this connection, U S WEST indicates that the Managing Director has reduced fees upon a demonstration that the costs of processing particular applications differed significantly from the fees contained in the Fee Schedule.

Congress has significantly revised the Commission's Fee Schedule and specifically included provisions for reduced fees for certain categories of multiple applications. See Omnibus Budget Reconciliation Act of 1989, Pub. Law No. 101-239, 103 Stat. 2106, codified at 47 U.S.C. § 158. Examples of these new provisions may be found in the following sections of the Commission's rules: 1.1105(2)(e), (4)(e), (5)(f), (6)(e), (7)(e), (8)(e), (10)(c), (11)(d), (12)(c), and (13)(c). And, in point of fact, application fees for transfers of licenses in the Public Land Mobile Radio Service (§1.1105(2)(e)), the Rural Radio Service (§1.1105(4)(e)), and the Point-to-Point Microwave Service (1.1105(6)(e)), the

subjects of the instant request, are among those filings for which Congress has already reduced fees in the case of multiple filings. We do not believe, therefore, that Congress intended that the Commission should engage in further ad hoc fee determinations following these statutory adjustments to the Fee Schedule.

Accordingly, U S West's request for a waiver is denied.

Sincerely,

for Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
Federal Communications Commission
Washington, DC 20554

CC Docket No. 92-115

In the Matter of

Revision of Part 22 of the Commission's rules governing the Public Mobile Services

NOTICE OF PROPOSED RULE MAKING

Adopted: May 14, 1992 Released: June 12, 1992

Comment date: August 21, 1992
Reply comment date: September 21, 1992

By the Commission:

INTRODUCTION

1. In this Notice we propose to revise Part 22 of our rules governing the Public Mobile Services. These revisions, which are set forth in the attached appendices, are proposed in order to make our rules easier to understand, to eliminate outdated rules and unnecessary information collection requirements, to streamline licensing procedures and to allow licensees greater flexibility in providing service to the public.

BACKGROUND

2. We completed our last comprehensive review and revision of Part 22 of the rules in 1983.[1] More recently, the Mobile Services Division (MSD), through its own initiative, established an internal task force to study revising Part 22 of the rules. This task force met throughout 1989 and 1990 and suggested many specific rule changes. In response to the rule changes proposed by the task force, other members of the MSD staff also offered comments and suggestions. In addition, several telecommunications organizations have submitted suggestions for revisions to Part 22.[2]

DISCUSSION

3. Several factors make a revision and update of Part 22 of the rules desirable at this time. First, since the most recent revision of Part 22 in 1983, the Commission has engaged in numerous rule making proceedings that amended various sections of Part 22. A rewrite and update of Part 22 at this time will ensure that the rules adopted in these rule making proceedings are consistent and applicable today.

4. Second, since our last rewrite, significant changes have occurred in the Public Mobile Services that make some of our rules obsolete and unnecessary. For example, in the cellular service, almost all of the 306 Metropolitan Statistical Areas (MSAs) and New England County Metropolitan Areas for the New England States (NECMAs) and most of the 428 Rural Service Areas (RSAs) have been licensed to provide service. This fact, and other rapid developments in the cellular industry have rendered many of the Commission's rules governing the acceptance, processing and selection of applications for initial cellular authorizations in the MSAs, NECMAs and RSAs obsolete. In addition, because the first cellular license granted will expire on October 1, 1993,[3] and many other cellular authorizations will expire shortly thereafter, new rules governing the acceptance and processing of applications from parties competing against renewal applicants have been adopted.[4] Part 22 should be revised and updated to better incorporate these and other new rules.

5. Third, substantial changes in technology have occurred, causing some of the technical specifications in our rules to become outdated or unnecessary. Changes in technology have also made it desirable to provide carriers with greater flexibility to deal with new and changing circumstances while, at the same time, promoting the public interest.

6. Fourth, the Metric Conversion Act of 1975 designates the metric system as the preferred system of weights and measures and encourages federal agencies to use the metric system in procurement, grants and other business activities. In converting Part 22 rules involving heights and distances from English units to metric, rounding of the converted quantities to convenient whole numbers is desirable, but sometimes causes slight changes that require public consideration in a notice and comment rule making proceeding.

7. Attached Appendix A contains a section by section description of the proposed substantive changes to Part 22 of the rules. However, in the following paragraphs, we present a brief discussion of the more significant proposals.

8. **Reorganize Part 22.** Part 22 has been reorganized so that the rules are grouped in a more logical arrangement of subparts. Lengthy rule sections in the current rules that cover a number of different and

sometimes unrelated topics have been broken up into separate sections, making it less difficult to find specific rules. Under the proposed organization, rules common to all Public Mobile Services[5] are consolidated under the first three subparts, while rules that apply only to specific services are grouped under subparts covering those specific services. We propose to retitle the individual radio services to more clearly indicate the types of service provided.[6] Currently, rules in the subpart governing paging and radiotelephone services are separated according to frequency ranges, without regard to the purposes for which the channels may be used. By contrast, in the proposed subpart, rules are organized according to types of operation, such as one-way paging operation, two-way mobile operation, and point-to-point operation. In addition, we propose to consolidate the rules governing air-ground radiotelephone services under a single subpart. Currently, the rules governing air-ground service to persons aboard general aviation aircraft are contained in the subpart governing paging and radiotelephone services, while the rules governing air-ground service to passengers on commercial airliners are in a separate subpart.

9. **Applications to be granted on a "first come, first served" basis.** We are proposing that all mutually exclusive applications in the Public Mobile Services be processed using a "first come, first served" procedure. We recently adopted rules establishing the use of this procedure for unserved area cellular applications.[7] Under the proposal, only mutually exclusive applications received on the same day would be entitled to be included in a random selection process. Major filings would still be listed in periodic public notices, and a 30 day period for filing petitions to deny would remain.[8] However, the 60 day period we currently allow for the filing of competitive applications would be eliminated. The proposed "first come, first served" procedure would eliminate the need for most of the random selection processes we now conduct, expedite the processing of applications and prevent applicants from filing applications simply to impede a competitor's applications.

10. Although our strong preference is to adopt the "first come, first served" procedure, we note that this procedure could, in some instances, limit the opportunity for carriers to file applications to expand an existing system on a specific channel. Therefore, we request comment on whether there are other alternatives to our proposal that would permit competing applications for certain circumstances, such as system expansion, while also enabling us to process applications promptly. The disadvantage of providing increased opportunity for filing mutually exclusive applications is that processing of these applications involves the expenditure of much more staff effort and resources. This could harm the interests of all licensees in that service, not just the parties that wish to compete for a particular channel. We request that interested parties provide a cost-benefit analysis as to whether the "first-come, first-served" procedure or some alternative procedure would better serve the public interest.

11. **Conditional Grants.** We are proposing to rely on the technical exhibits provided by applicants without verifying their accuracy prior to grant. In this regard, carriers filing applications for Public Mobile Service radio station authorizations with the Commission must already certify that the statements made in the application, including all technical exhibits, are complete and correct. We propose to strengthen this certification to state that the applicant has carefully reviewed the engineering of its proposal and certifies that it complies with the Commission's technical rules for operation on an interference-free basis. We believe that implementation of this proposal could reduce the time required to process applications by as much as 50 percent. With the new certification in place, all authorizations in the Paging and Radiotelephone and the Rural Radiotelephone Services would be granted on the condition of non-interference for the entire term of the license. Once operations commence, if interference occurs because of an error or omission in the technical exhibits to the application, the Commission would retain the right to order the licensee, without affording an opportunity for a hearing, to suspend operation of the facilities at the locations causing the interference, until the interference is resolved. We request comment on this proposal. We also request comment as to whether the condition should remain in effect for a more limited term.

12. We are presently undertaking efforts to eliminate from our computer data base duplicate and erroneous records and records of expired facilities. Our intent is to make this data base as accurate as possible. These efforts should enable applicants to continue to provide reliable technical exhibits, preventing occurrences of interference due to faulty data. In addition, licensees would still be able to inspect applications on file with the Commission to determine whether the technical exhibits are faulty. In any event, we have found that, in the few instances where interference has occurred, the licensees or their representatives have usually been able to resolve the problems through meetings and negotiations.

13. **Adopt spectrum finder's procedures.** In an effort to recapture unused spectrum and to facilitate expeditious reassignment of channels to persons who will use them productively, we are proposing to adopt a concept called a "finders preference."[9] Under our proposal, an applicant would be able to file a "finders" application for a Public Mobile Service channel that is assigned, but is not currently being used. While such an application would now be dismissed as defective, under the proposed rules it would be kept on file pending the outcome of a staff investigation into the underlying licensee's alleged noncompliance with our construction and operation rules. If our investigation revealed that the licensee was not complying with these rules, the licensee could be subject to a forfeiture, the authorization could be canceled and we could recover and reassign the affected channels. The applicant's "finders" application would then be considered the first filed for the recovered channel.

14. **Grant a limited amnesty period.** We are announcing a limited amnesty period during which licensees who turn in authorizations for unused channels will not be subject to forfeitures for discontinuing service without notifying the Commission in accordance with Section 22.303 of our rules or for notifying the Commission of commencement of service when, in fact, such service has not commenced. The limited amnesty period will begin on the date this Notice of Proposed Rule Making is published in the Federal Register until the date that new rules adopted in this proceeding become effective. After the amnesty period, licensees violating our construction and operation rules would again be subject to forfeiture or any other appropriate enforcement action.[10]

15. **Replace the Carey method.** We propose to discontinue our reliance on the methods outlined in the Carey Report for evaluating proposed stations in the Public Land Mobile and Rural Radio services.[11] In place of these methods, we propose to use six relatively simple formulas to define the service areas and interference potential of all VHF and 450 MHz UHF stations in these services.[12] Use of the proposed formulas will eliminate the ambiguities inherent in the Carey method and facilitate development of simpler and more efficient personal computer and programmable hand calculator software to perform interference studies. Assignments made using the proposed formulas would be compatible with existing assignments because the formulas produce results that are very close to the Carey method. Also, we propose to convert all of the graphs and many of the tables in the rules to formulas, where it appears to be mathematically feasible. As with the Carey curves, graphs are subject to differing but equally valid readings because of the limits of human visual acuity. Tables are not ambiguous, but they must either be lengthy or employ interpolation methods that complicate adaptation to computer programs. Formulas have the advantages of always yielding the same result for a given set of parameters, and being compact and easy to program. In those instances where it does not appear to be beneficial or mathematically feasible to convert graphs to formulas, we propose to convert them to tables instead. These proposals are not intended to affect existing systems established using the Carey method.

16. **Eliminate traffic loading studies.** Our rules currently require applicants to file traffic loading studies if they request one or more additional channels for an existing two-way station.[13] These studies were initially adopted for two-way channels to ensure efficient use of the paired channels.[14] In order to obtain additional two-way channels, our rules require a licensee to conduct channel occupancy measurements to demonstrate that existing and projected traffic on its system necessitates the assignment of additional channels. However, in view of the proliferation of competitive telecommunication services including cellular radiotelephone, and our decisions in other proceedings affecting public mobile service[15] channel usage, we believe that the traffic loading studies we have required are no longer a reliable indicator of efficient spectrum utilization. Additionally, these studies are burdensome for licensees to conduct and for our staff to evaluate. We are therefore proposing to eliminate traffic loading study requirements. To prevent warehousing of spectrum, we are proposing to use, instead of the traffic loading studies, the procedures that we have been using for several years to govern additional channel requests for one-way paging operations. Under the proposed rules, applicants may apply for no more than two channels at a time and must be providing service on those channels before applying for additional channels.[16] We believe that this method would allow licensees that need additional channels the opportunity to obtain them, while continuing to provide an adequate safeguard against warehousing.

17. **Eliminate notification requirements for minor changes and additional transmitters within contours of authorized stations.** Our rules currently allow licensees to make minor changes to facilities and to construct and operate additional transmitters without prior Commission approval, provided that they notify the Commission by filing an FCC Form 489.[17] However, these notifications are routine and seldom involve

concerns that a licensee is expanding into new territory or exceeding its current contours. We propose to modify our rules to allow licensees to make such changes to their facilities without seeking prior Commission approval or notifying the Commission of such changes. Licensees would be required to maintain accurate up-to-date records of facilities added or modified that could be provided to the Commission upon request. We emphasize, however, that all licensee construction will continue to be subject to FAA and FCC antenna structure clearance requirements and rules governing construction that may have a significant environmental effect.[18] This proposal is intended to conserve both Commission and industry resources. We request comment on the advantages and disadvantages of this proposal.

18. **Revise application and notification forms.** Upon implementation of rule changes proposed herein, we would require the use of redesigned FCC Forms 401, 489, and 490.[19] Currently, we generally require FCC Form 401 for major filings and FCC Form 489 for minor filings.[20] Under the proposed rules, we would require Form 401 for major and minor applications and amendments (filings that result in a Commission action to grant, dismiss or deny) and Form 489 for notifications (filings that do not require a Commission action). To prepare for future electronic filing and filings on magnetic media, and to facilitate automated entry of station technical data into a relational computer data base, we have restructured FCC Form 401 into a modular format. To accommodate the modular format, some of the data items on the current forms must be relocated. Other changes include eliminating unnecessary or duplicative items.

19. **Termination of Authorizations.** There appears to be some confusion among licensees as to when a Public Mobile Services authorization terminates for failure to commence service in the time period required by the rules. The proposed rules would provide that authorizations automatically expire without further action by the Commission. Furthermore, the 30-day reinstatement period would be eliminated. Requests for extensions of the construction period filed prior to expiration would be granted only for causes outside of the licensee's control. These provisions would strengthen existing Commission policies designed to promote prompt service to the public and to deter spectrum warehousing.

20. This tough policy, however, has been criticized by some licensees as unnecessarily harsh and inflexible. Some argue that the policy fails to take into account business necessities, e.g., when a paging licensee must build out a wide-area system and cannot, for practical reasons, commence operations at all sites before the expiration of the construction period. We request comment, therefore, on alternative standards that could be nondiscriminatorily administered, yet prevent abuses, such as warehousing.

21. We welcome comment on any and all of the proposed revisions to Part 22. We also invite suggestions for any other proposals or refinements to the proposals that we have made in this proceeding.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

22. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203 and 1.1206(a).

Comment Information

23. Pursuant to applicable procedures set forth in Section 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before August 21, 1992 and reply comments on or before September 21, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

Initial Regulatory Flexibility Analysis

24. **Reason for action and objective.** The Commission is proposing to revise Title 47, Part 22 of the Code of Federal Regulations to eliminate unnecessary information collection requirements and, wherever possible, provide greater flexibility to carriers while at

the same time promoting the public interest. The objective of this proposal is to provide effective and adaptive regulation for communications.

25. **Legal Basis.** Authority for this notice is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. 154(i) and 303(r).

26. **Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rules would retain most of the existing reporting, recordkeeping and other compliance requirements, without significant change. In some instances, a current filing requirement would be replaced by a less burdensome filing or recordkeeping requirement. A few new requirements are proposed. For example, one of the proposed new rules would require that applicants file agreements and an affidavit when payment is made in exchange for refraining from filing a petition to deny. For another example, the proposal concerning finder's application would require applicants to file additional information not currently required in order to obtain a benefit not currently available. Overall, this comprehensive rewrite would result in a net reduction in reporting, recordkeeping and other compliance requirements.

27. **Federal rules that overlap, duplicate or conflict with these rules.** None.

28. **Description, potential impact and number of small entities affected.** There are approximately 8,600 licensees subject to the rules in Part 22. A substantial portion of these are small entities. There are also a number of small entities whose business is consulting or providing other services in connection with Part 22. The proposed rewrite would not significantly impact these small entities.

29. **Significant alternatives minimizing impact on small entities and consistent with stated objectives.** The proposals contained in this Notice are meant to simplify and ease the regulatory burden on all Public Mobile Services applicants and licensees consistent with the Commission's established public interest objectives.

30. **Service.** The Chief Counsel for Advocacy of the Small Business Administration will be served with a copy of this Notice of Proposed Rule Making in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a).

ORDERING CLAUSE

31. Accordingly, IT IS ORDERED That, pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r), this Notice of Proposed Rule Making IS ISSUED. IT IS FURTHER ORDERED That the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1]See Notice of Proposed Rule Making in CC Docket No. 80-57, 47 FR 43842 (October 4, 1982) and the subsequent Report and Order, 95 FCC 2d 769 (1983).

[2]Suggestions were submitted by Telocator, the Cellular Telecommunications Industry Association (CTIA), International Mobile Machine Corporation (IMM), Bell Atlantic Mobile Systems (Bell Atlantic) and the Federal Communications Bar Association (FCBA) Land Mobile Practice Committee.

[3]Cellular radio licenses are granted for a ten year term. The first license, issued to a wireline operator in the Chicago, Illinois MSA, will expire on October 1, 1993. Between 1993 and 1996, approximately 259 licenses will expire.

[4]See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 7 FCC Rcd 719 (1992), pet. recon. pending.

[5]As currently defined, these services are the Public Land Mobile Service, the Rural Radio Service, the 800 MHz Air-ground Radiotelephone Service, the Offshore Radio Telecommunications Service and the Domestic Public Cellular Radio Telecommunications Service.

[6]The Public Land Mobile Service would become the "Paging and Radiotelephone Service." The new name better reflects the principal types of service provided. The Domestic Public Cellular Radio Telecommunications Service would be shortened to the "Cellular Radiotelephone Service." The 800 MHz Air-ground Radiotelephone Service, after consolidation with the 450 MHz air-ground service, would be retitled the "Air-ground Radiotelephone Service." The names of the other services, Rural Radio and Offshore Radio Telecommunications, would also be slightly changed in order use terminology consistently.

[7]6 FCC Rcd 6185 (1991).

[8]Section 309(b) of the Communications Act of 1934, as amended, (47 U.S.C. 309(b) requires public notice and a thirty day period before the Commission may grant certain applications.

[9]This concept was initially presented to the Commission in 1988 and 1989 by the Special Industrial Radio Service Association, Inc. (SIRSA) and the National Association of Business and Educational Radio, Inc. (NABER). See Notice, 5 FCC Rcd 6401 (1990). In addition, the Commission recently implemented a "finder's preference" program in Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Stations, 6 FCC Rcd 7297 (1991).

[10]See generally Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, Mimeo No. 92-212, adopted May 14, 1992.

[11]The Carey Report is FCC Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Service" by Roger B. Carey. The Carey report outlines procedures comprising manual calculations and the visual reading of detailed curves on graph paper. However, in day-to-day application processing, the Commission staff actually uses a lengthy, complex Fortran computer program on its mainframe computer to perform routine interference studies.

[12]See proposed sections 22.537 and 22.567.

[13]See 47 CFR 22.16 and 22.516(a)(2).

[14]See Procedures for Domestic Public Land Mobile Radio Service, 53 RR 2d 191, 193 (1983).

[15]See, for example, Flexible Allocations of Frequencies in the Domestic Public Land Mobile Service for Paging and Other Services, 4 FCC Rcd 1576 (1989), in which the Commission decided to allow market forces to determine which common carrier services are offered on two-way public mobile channels.

[16]See proposed section 22.569.

[17]See current Sections 22.9 and 22.117(b). Commission approval is required for facilities involving international coordination.

[18]See 47 CFR 1.1301 et seq.

[19]Examples of the redesigned forms are attached to the Commission release of this Notice of Proposed Rule Making.

[20]The second portion of FCC Form 401 (Schedule B) is required to be used as an attachment to some types of FCC Form 489 filings.

APPENDIX A

PROPOSED RULES DISCUSSION

This appendix discusses the major rule revisions. Rules that are changed only in format or style, rules that are only reworded or retitled, rules with only minor or non-substantive changes, and rules we propose to delete because they are unnecessary are not discussed in this appendix. Appendix B sets forth proposed Part 22 essentially in its entirety. A table for cross-referencing the current rules and the proposed rules appears in Appendix C.

§ 22.99 Definitions.

The definitions for Part 22 are updated. Some definitions are removed and others added. More appropriate titles for the various public mobile services are proposed. For example, the "Domestic Public Cellular Radio Telecommunications Service" is retitled the "Cellular Radiotelephone Service", and the "Public Land Mobile Service" (PLMS) is retitled the "Paging and Radiotelephone Service". The terms "frequency" and "channel" are defined in more technically correct terms. These two terms have often been used interchangeably over the years to refer to assignments of the electromagnetic spectrum. However, they are not the same, and as advances in technology have made it feasible to transmit more than one emission in the bandwidth normally assigned for one emission, we believe it is timely to refer to the bandwidth we normally assign for one emission as a "channel".

§ 22.101 Station files.

This proposed rule would codify the long-standing policy that station files at the Commission constitute the official record for each station. This proposed rule is intended to inform applicants and licensees that the Commission's unofficial records or data bases are not official records and that reliance on these secondary sources does not establish or deprive parties of their rights. See e.g., Mobilfone of Northeastern Pennsylvania, Inc., 5 FCC Rcd 7414 (Com. Car. Bur., released December 11, 1990).

§ 22.105 Written applications, standard forms, microfiche, magnetic disks.

We propose to revise our microfiche rules to require that all applications on standard forms (including all exhibits and attachments), regardless of their length, and any filings pertaining to a current or pending application or an existing authorization must be filed in microfiche form. Except in the case of emergency filings, all filings longer than three pages must be submitted in microfiche form. We propose these revisions to our microfiche rules for several reasons. First, we note that we propose to redesign FCC Form 401 to less than five pages. Despite the proposed changes to the FCC forms, which would make some filings shorter than they currently are, we must continue to require that applicants file their applications in microfiche form because of our file storage space constraints. Secondly, we propose these changes because of constraints on the Commission's microfiching resources. We propose also to modify our rules to require that all microfiche appear on a black background. Furthermore, we propose a rule that permits applicants to submit the technical and administrative data contained in their applications on standard 3½ inch magnetic disks, formatted in MS-DOS 2.0 or higher. We seek comment on the proposed format, the type of file to be used, and the data field delimiter. Finally, we intend that technical information submitted by licensees on magnetic disks be sufficient to enable the Commission to automatically generate notifications to the International Frequency Registration Board (IFRB). We emphasize, however, that any rules which the Commission adopts with respect to filings on magnetic disks would not become effective until the Commission can implement fully this process.

§ 22.120 Application processing; initial procedures.

This proposed section clarifies and updates § 22.27, and specifies the initial procedures the Mobile Services Division (MSD) follows when processing applications for authority to operate a PMS station.

§ 22.121 Repetitious, inconsistent or conflicting applications.

We are proposing to revise current rule § 22.21 to provide that where an authorization is automatically terminated for failure to commence service, the Commission will not consider a later filed application by the same party for authorization to operate a station on the same channel (or in the case of 931 MHz paging station, in the same frequency range) in the same geographical area until one year after the date the authorization is terminated. This proposal will encourage licensees to construct facilities for which they have received an authorization and will thus discourage warehousing.

§ 22.123 Classification of filings as major or minor.

We propose to clarify current § 22.23 concerning the classification of filings as major or minor. This classification is pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309. The Commission cannot grant major filings until 30 days after public notice of such filings is given. Currently, the rules provide only guidelines for classifying amendments. The proposed rule goes beyond this by setting forth the rationale for classification of all filings. With respect to filings in the Public Land Mobile and Rural Radio Services, we seek comment on whether there are circumstances under which a change in the location of a fixed transmitter or other changes to an existing fixed transmitter could properly be considered minor rather than major.

§ 22.124 Notification processing.

This proposed rule section outlines MSD's procedures for processing notifications. The number of notifications MSD receives has grown steadily and accounts for a significant portion of the processing work load.

§ 22.125 Applications for special temporary authorizations.

This proposed rule section consolidates and clarifies all rules governing the filing and processing of requests for special temporary authorizations.

§ 22.128 Dismissal of applications.

This proposed rule section consolidates the provisions of current §§ 22.20 and 22.28 pertaining to dismissal of applications.

§ 22.129 Agreements to dismiss applications, amendments or petitions to deny.

We propose to add a new rule concerning agreements to amend or dismiss applications or pleadings. The proposed rules are designed to prevent speculation and are similar to those adopted recently in the broadcast renewal process. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 4780 (1989), recon. 5 FCC Rcd 3911 (1990). We believe that the policy of permitting payments for settlements of mutually exclusive applications proposals may encourage the filing of non-bona fide applications. These non-bona fide applications, in turn, may persuade legitimate applicants to pay them off to avoid protracted litigation, thus resulting in needless expenses to legitimate applicants. This, in turn, wastes Commission resources and delays initiation of service to the public. This proposed rule would require that a party that has filed an application for authorization to operate a PMS facility that is mutually exclusive with one or more other applications and that enters into a written agreement to withdraw its application must obtain the approval of the Commission. This rule would also limit the consideration that an applicant can receive for agreeing to withdraw an application to the legitimate and prudent expenses of the withdrawing applicant. See Amendment of Section 73.3525 of the Rules Regarding Settlement Agreements Among Applicants for Construction Permits, FCC Rcd 85 (1990), recon., 6 FCC Rcd 2901 (1991). See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, 7 FCC Rcd 719 (1992).

We are also proposing to amend the present rule to address dismissal of petitions to deny. Our experience has shown that parties may file petitions to deny just to extract money from an applicant or to delay the applicant and thus force a settlement. Non-legitimate petitions also burden applicants, waste Commission resources and do not serve the public interest. Accordingly, we propose to limit settlement payments that can be made in exchange for withdrawing petitions to deny filed in initial licensing, modification and assignment proceedings. We propose that when a petition to deny is withdrawn in exchange for money, the payment to the petitioner be limited to the legitimate and prudent expenses in prosecuting the petition. See Amendment of Section 1.420 and 73.3584 of the Commission's Processes, 5 FCC Rcd 3902 (1990). See e.g., Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants of the Renewal Process, 4 FCC Rcd 4780 (1989), recon., 5 FCC Rcd 3911 (1990). We also note that in Rules for Unserved Areas (Further Notice of Proposed Rule Making), 6 FCC Rcd 6158 (1991), we have proposed that rules similar to proposed §§ 22.129 and 22.130 be adopted with respect to all cellular applications.

§ 22.133 Random selection process.

This revision of present § 22.33 eliminates provisions that delineate the lottery procedures for cellular applications in the top-120 markets, and MSA/RSA markets beyond the top-120. Because initial lotteries in these markets have already occurred and cellular service has been provided in most of these markets, these rules are

no longer necessary. This proposed rule would not alter the current random selection procedures governing mutually exclusive applications for initial authorizations, as needed, in the cellular service.

In addition, we propose to eliminate paragraph (c) of current § 22.33, which allows mutually exclusive applicants in the Public Land Mobile Service to request a comparative hearing in lieu of a random selection process under certain circumstances. In Lotteries Selection Among Applicants (reconsideration), 49 FR 49466 (1984), 57 RR 2d 427 (1984), (Lotteries Reconsideration), the Commission provided that Public Land Mobile Service (PLMS) licensees applying to expand an existing system on the same channel, whose applications are mutually exclusive with other applications, could request that a comparative hearing be used, in lieu of a random selection process, to decide which application would be granted. The purpose for this provision was to allow the expansion applicant an opportunity to try to demonstrate that expansion of its existing system, which would have to be accomplished on the channel already authorized, might better serve the public than the authorization of a new station, which could be done on any available channel. To date, however, no applicant has been able to satisfactorily demonstrate this, and thus, no such hearings have been held. Our proposal to process applications on a "first come - first served" basis, if adopted, would make the deliberate filing of mutually exclusive applications unlikely, and consequently make this provision unnecessary. For these reasons, it is proposed that the current rule which allows mutually exclusive applicants to request a comparative hearing under certain circumstances be eliminated. We are also proposing to eliminate current § 22.35, which allows mutually exclusive applicants to request expedited hearing procedures. To our knowledge, these hearing procedures have not been utilized recently. We seek comment on the proposed elimination of these rules. In particular, we request information as to whether any circumstances exist which would warrant that these procedures be maintained.

§ 22.135 Settlement conference.

We propose to adopt a rule directing parties or their attorneys to participate in settlement conferences regarding application proceedings. In particular, the proposed rule emphasizes that where the Commission determines that a settlement conference should be convened: 1) the parties or their attorneys are obligated to participate, in person or by telephone conference call; and 2) failure to participate in such a conference will be deemed a failure to prosecute, rendering that party's application or petition defective and subject to dismissal. We propose this rule to expedite the resolution of petitioned proceedings.

§ 22.142 Commencement of service; notification requirement.

This proposed rule, currently in § 22.43, has been revised to require that stations must be constructed and be providing service to the public by the end of the construction period. If a licensee fails to provide service to the public by the date of required commencement of service, the authorization is automatically terminated without any further notice from the Commission. We ask for comment on whether automatic expiration of a construction authorization is consistent with Section 319(b) of the Act. See Edmond A. Baker v. FCC, 834 F.2d 181, 185 (D.C. Cir. 1987); MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257 (D.C. Cir. 1968); Mass Communicators, Inc. v. FCC, 266 F.2d 681 (D.C. Cir.), cert. denied, 361 U.S. 828 (1959). This proposed rule policy is intended to encourage licensees to construct and provide service to the public as expeditiously as possible. The proposed rule has also been revised to clarify the types of circumstances that warrant extensions of time to complete construction.

§ 22.143 Construction prior to grant of application.

This proposed rule consolidates all current rules and policies regarding the construction of facilities prior to grant of an authorization to operate same (informally called "pre-construction rules").

§ 22.144 Termination of authorization.

This proposed rule, presently § 22.44, lists the five ways, other than revocation, that a Public Mobile Services authorization can be terminated.

§ 22.145 Renewal application procedures.

This proposed rule states that applications for renewals of authorization must be filed by the licensee prior to, but no more than 30 days before the expiration date of the license. The current rule requires applicants to file their renewal no sooner than 60 days and no later than 30 days prior to the expiration date of the authorization. The proposed rule would eliminate the "gap", a period of time after the 30 day filing period during which it is too late to file for renewal, but the authorization has not expired. In addition, we propose to eliminate the current provision that allows licensees

who failed to timely file their renewal applications due to confusion about the aforementioned gap to file reinstatement applications after the authorization expires. Because the gap would be eliminated, reinstatements should no longer be needed.

§ 22.147 Authorization conditions.

We propose to adopt a rule providing that authorizations in the Paging and Radiotelephone Service and the Rural Radiotelephone Service are subject to the condition that if interference occurs upon commencement of operation because of an omission or error in the required technical exhibits of the application, the Commission may order the licensee, without a hearing, to suspend operations at the location causing the interference until the interference is resolved. This proposal strikes a balance between the our intent to ensure interference-free operation and our expectation that applicants be accountable for the accuracy of their technical exhibits, which should demonstrate compliance with our rules. Cf. P & R Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984).

§ 22.150 Standard pre-filing technical coordination procedure.

This proposed rule section would consolidate two repetitive sections (current §§ 22.100(d)(1)-(d)(11) and 22.501(m)(4)). This procedure currently applies (and as proposed would apply) only to two types of authorizations: Microwave fixed stations (see proposed § 22.601) and Hawaii inter-island fixed service on 488-494 MHz (see proposed § 22.603).

§ 22.157 Distance computation.

We propose to add a new rule that sets forth the procedure to be used for calculating the distance between two locations. The method set forth is accurate for distances up to 475 kilometers (295 miles). Currently, Part 22 instructs PMS licensees to use the distance computation method given the broadcast TV rules (Part 73). However, the TV rules, in turn, refer to the commercial broadcast FM rules. The Commission has revised the FM broadcast method twice in the last ten years for reasons significant principally to FM broadcast stations. We believe that the distance computation rule for Part 22 licensees should not change as a result of Mass Media concerns, and furthermore, PMS licensees should not need to obtain a copy of Part 73 in order to locate a rule that applies to them. For these reasons, we propose this new rule section.

§ 22.159 Computation of average terrain elevation.

We propose to revise current § 22.115(c) to specify that average terrain elevation determinations be performed by computer, except in cases of dispute. Under the current rule, average terrain determinations are to be performed manually, using profile graphs derived from topographical maps, except that such determinations may also be performed by computer. Since the most efficient method of computing average terrain elevation is by computer, most applicants take advantage of the current "exception", and practically none use the manual method required by the rule. The proposed rule revision reflects this reality. Nevertheless, we seek comment on whether applicants should be required to continue to perform such determinations manually.

§ 22.163 Minor modifications to existing stations.

Our rules currently allow licensees to make minor modifications (informally called "permissive changes") to existing facilities under certain circumstances, provided that the Commission is notified of the modifications (FCC Form 489). We are proposing to eliminate the requirement that licensees notify the Commission of such modifications. Of course, there would be no record of the modifications in the station files or computer data bases; consequently, these transmitters might not be protected from interference. The purpose of this proposal is to reduce the number of notifications filed and thus conserve Commission and industry resources. We seek comments on the costs and benefits of implementing this proposal.

§ 22.165 Additional transmitters for existing systems.

Our rules currently allow licensees to construct and operate additional transmitters if, in the case of cellular systems, the service area boundaries of the additional transmitters are located within the licensee's market during the five year fill-in period or within the CGSA or, in the case of paging systems, if the service and interfering contours are located within existing such contours, provided that the Commission is notified of the additional transmitters (FCC Form 489). We are proposing to eliminate the requirement that licensees notify the Commission of such additional transmitters. Of course, there would be no record of the additional transmitters in the station files or computer data bases; consequently, these transmitters would not be protected from interference. The purpose of this proposal is to reduce the number of notifications filed and thus conserve Commission and industry resources. We seek comments on the costs and benefits of implementing

this proposal.

§ 22.167 Applications for assigned but unused channels.

This proposed section sets forth procedures for implementing a "finder's preference" concept whereby applicants may apply for assigned but unused Public Mobile Service channels prior to the deletion of their assignment from Commission station files. PMS licensees are required to comply with certain Commission requirements to maintain the validity of their authorizations. If a licensee fails to comply with rules requiring the provision of service to the public, the authorization terminates and the channels involved can then be reassigned to another applicant. To expedite reassignment of channels that are not being utilized, we propose to allow an applicant to file a "finders" application that does not meet the technical protection requirements with respect to a currently assigned but allegedly unused channel, provided that they supply information revealing that the specifically identified facility has failed to commence service or has discontinued service, in violation of proposed § 22.144(b) and (c) of our rules. We propose that a finder's application include (1) the name and address of the licensee; (2) the licensee's call sign and the location of the licensed facility; and (3) a statement providing details concerning the alleged nonuse of the facility. The Commission would then place such "finders" applications on Public Notice, identifying them as such and listing them as tentatively acceptable for filing. Under the proposed rule, the staff may also conduct an investigation to verify that the authorization for the identified facility has, in fact, terminated.

§ 22.305 Operator and maintenance requirements.

This proposed rule, presently § 22.205, has been revised to no longer require that licensees' maintenance agreements with third parties be in writing. This requirement is unnecessary because licensees, on their own accord, should ensure that such contracts are legally binding. Also, such contracts do not under any circumstances relieve the licensee of its responsibility for lawful station operation.

§ 22.313 Station identification.

This proposed rule is a revision of current § 22.213. We propose a new paragraph that allows paging and radiotelephone stations to be identified by the call sign of another station of the same licensee in the same system. Currently we receive requests to "consolidate call signs" of systems that were originally authorized in separate parts and bear different call signs. Licensees wish to use the same control center identifier for the entire system to conserve air time. Sometimes it is extremely time consuming or impossible for the MSD staff to merge large stations under one call sign. Consequently, we have from time to time waived the station identification requirement to allow licensees to use a different call sign than the one assigned, in order to satisfy the consolidation request without merging the files. The proposed rule would eliminate the need for these routine waivers.

§ 22.317 Discontinuance of station operation.

This proposed rule, presently § 22.303, has been revised to make clear that a station that has not provided service to the public for 90 continuous days is considered to have been permanently discontinued.

§ 22.321 Equal employment opportunities.

We are committed to the principle of equal employment opportunity in the communications common carrier industry. Accordingly, the proposed rule maintains (1) the requirement that Public Mobile Services licensees afford equal opportunity in employment and (2) the prohibition on discrimination against personnel on the basis of sex, race, color, religion or national origin. We propose to reorganize some of the paragraphs in the existing rule for clarity. In particular, the current wording seems to imply that the EEO program statement filing requirement applies only to stations in existence prior to December 17, 1970. The proposed rule is reworded to make it clear that the filing of EEO statements is an on-going requirement, and to change the annual date by which updates are to be filed from April 1 to May 31, the same date that annual employment and complaint reports are due. This will serve to consolidate all CCB EEO filings on this date. Additionally, a NOTE provides a catch-up date for carriers who may have failed to file EEO program statements because of confusion due to the wording of the current rule.

§ 22.325 Control points.

We propose to combine the control point requirements for all of the Public Mobile Services in this rule. Furthermore, we propose to eliminate the provisions in present § 22.909 requiring cellular operators to obtain Commission approval prior to moving the location of the control point beyond the boundary of the CGSA. Allowing cellular licensees the flexibility to combine their

control points without seeking prior Commission approval reflects the reality of technological changes that result in greater operational efficiency.

§ 22.355 Frequency tolerance.

We propose to specify transmitter frequency tolerances in terms of parts per million (ppm) rather than per cent (%). (Per cent is parts per hundred). This reflects the fact that modern solid state transmitters are considerably more stable than transmitters used ten to twenty years ago.

§ 22.359 Emission masks.

We propose to specify resolution bandwidths for instruments used to measure compliance with the emission masks specified. Callers frequently ask the MSD staff for this information. The bandwidths are determined by the Commission's laboratory.

§ 22.371 Disturbance of AM broadcast station antenna patterns.

This proposed rule codifies existing policy developed in response to the proliferation of cellular towers over the last ten years. The rule sets forth only the responsibility of Public Mobile Services licensees in avoiding interference in the AM broadcast service. Responsibilities of AM licensees (to measure power by the direct or indirect method, for example) is contained in Part 73 of the Commission's rules.

§ 22.377 Type acceptance of transmitters.

This rule, present § 22.120, is revised to clarify that transmitters operating under a developmental authorization do not have to be type accepted.

§ 22.401 Description and purpose of developmental authorizations.

This rule, presently in §§ 22.400 and 22.401, has been revised to state that developmental authorizations may be issued to determine whether a station can operate without causing interference to existing stations.

§ 22.411 through § 22.417

These rules combine the provisions and requirements for routine developmental authorizations that are currently scattered throughout Part 22, and categorize them in a few sections by type of operation, radio service and frequency range.

§ 22.507 Number of transmitters per station.

This proposed rule would require a separate transmitter for every assigned channel at each location. This is intended to eliminate a practice among some licensees whereby one multi-frequency transmitter is installed at a site where two or more channels are authorized. Although the transmitter may transmit on any one of the authorized channels, it cannot transmit on more than one of them at the same time. We believe that such practice can result in inefficient use of the spectrum. Requiring at least one transmitter for each authorized channel at each location would discourage warehousing. However, we request comment as to whether there is a less stringent requirement that would also meet this objective.

We also propose to require that all transmitters within a station must be operationally related in order to be authorized together as a station. Unrelated transmitters that are widely separated geographically would not be authorized together as a station. This proposal is intended to codify our current policy, which promotes administrative efficiency by ensuring that station files comprise data on operationally related transmitters. It also helps to prevent particular station files containing the records of stations owned by large or nationwide companies from growing so large as to be unwieldy.

§ 22.509 Procedure for mutually exclusive applications.

This proposed rule would replace current §§ 22.33 and 22.35, insofar as these rules establish procedures to process mutually exclusive applications in the Public Land Mobile Service. We propose that all mutually exclusive Public Land Mobile Service applications be processed on a "first-come, first served" basis.

§ 22.513 Channel availability.

In general, the Commission requires applicants to request specific channels which they believe to be available when the application is filed. However, for the 931 MHz paging and 470-512 MHz point to multipoint channels, applicants are not required to request a specific channel because the Commission selects and assigns a channel when granting such applications. Often, a channel in these frequency ranges will become available after an application is filed but before it is acted upon or included in a random selection process. We are proposing this rule to provide that, when processing applications for which the Commission

selects the channel, any channel in the appropriate frequency range that becomes available before an application is (1) acted upon (if no random selection process is necessary) or (2) included in a random selection process (if held), may be assigned, regardless of whether it was available when the application was filed.

§ 22.535 Effective radiated power limits.

We propose to consolidate all transmitting power limits applicable to stations in each service or type of operation into a single section in the rules governing that service or type of operation. See also proposed §§ 22.565, 22.593, 22.627, 22.659, 22.809, 22.867, 22.913 and 22.1013. Currently, there is no maximum power limit in the rules governing the Rural Radio Service, including BETRS, other than for meteor burst systems. We seek comment as to what these limits should be. Although we have generally specified power limits in watts, we invite comment as to whether we should specify them in dBW instead, or in the alternative, whether we should specify a fixed percentage (such as 5%) for the accuracy with which transmitting power must be measured or maintained.

§ 22.537 Technical channel assignment criteria; one-way paging.

This rule would replace §§ 22.15(b)(2)(i) and 22.504, which outline procedures for determining harmful interference between co-channel stations. We propose to adopt a new method employing formulas (and in the case of 931 MHz paging, tables) for determining service areas and interfering contours. The proposed formulas closely track the contours calculated using the Carey procedures. As such, they serve as an administrative tool designed to facilitate application processing and are not meant as the most accurate theoretical propagation model.

§ 22.567 Technical channel assignment criteria.

This proposed rule, which would govern the technical assignment criteria for one-way or two-way mobile operations, is similar to proposed § 22.537 and would no longer require the use of the Carey method. Instead, applicants would use the formulas provided in this rule to define service areas and interference potential.

In § 22.567(b), we need to establish a method to protect fixed receivers on the mobile channels from base or fixed transmitters using those channels. In Flexible Allocation of Frequencies in the Domestic Public Mobile Service for paging and other services (Report and Order), 4 FCC Rcd 1576 (1989), we indicated that applicants for base and fixed transmitters to operate on the mobile channel should demonstrate non-interference with fixed receivers in accordance with a technical exhibit in that proceeding. Furthermore, we stated that such authorizations would be granted on a developmental basis. Since that time, the industry response has been that this demonstration severely limits the use of the mobile channel by base and fixed stations. We believe, however, that any other criteria designed to provide protection in theory to existing and future fixed receivers would likely be as stringent. Nevertheless, we solicit comment as to a new protection criteria that will enable licensees to provide an appropriate level of protection to fixed receivers while, at the same time, making more effective use of the mobile channels. The text of such criteria would be inserted at §22.567(b), which has been left blank in the Appendix. In the alternative, to allow greater use of the mobile channels for base and fixed use, we propose to allow the use of mobile channels for fixed and base operations subject to the condition that such use does not interfere with existing systems only. If after grant, interference occurs, the Commission would be able to order the licensee to suspend operation of particular base or fixed transmitters on the mobile frequency until such interference is resolved. See proposed § 22.147(b). We seek comment on this proposal.

§ 22.569 Additional mobile channel policies.

This proposed rule, which would govern the processing of applications for one-way or two-way mobile operations, would replace the present traffic loading requirements found in § 22.16 and 22.516. Under this proposed rule, the general policy would be to assign no more than two channels in an area to a carrier in an application cycle. Thus, similar to the rule for paging operations, a carrier would apply for no more than two channels, receive the authorization, construct the stations and notify the Commission of commencement of operation before applying for addition channels in the area. The proposed "two channels at a time" policy would replace the current requirement that applicants submit traffic loading studies.

§ 22.575 Use of mobile channel for control transmitter.

This is a revision of current § 22.518. The current rule was established to allow licensees to install and operate a moderate power control station with a relatively low antenna (essentially a "parked mobile

station") to control the base station of a two-way mobile telephone system. Here, controlling the base station meant turning it on and off, turning on tower lights, etc. and did not mean carrying subscriber traffic. The principal concern of the current rule is that subscribers not be able to override this control function. No interference was expected because of the relatively low power and antenna height employed, and the usual use of a directional antenna as well, limiting radiation in unwanted directions. Further, because the use of the control station could interrupt mobile traffic, the licensee in its own interest would ensure that control transmissions would be brief and infrequent.

Because most former two-way systems in the Public Land Mobile Service are now used for paging, several licensees have asked the MSD staff for interpretations of current § 22.518 as it may apply to multi-site paging systems. These licensees generally seek to use current § 22.518 to "get around" the stringent interference prevention requirement established in Flexible Allocation of Frequencies in the Domestic Public Mobile Service for paging and other services (Report and Order), 4 FCC Rcd 1576 (1989), for base and fixed usage of the mobile channel (see discussion of § 22.567 supra). However, controlling a paging system now means installing a high omnidirectional antenna driven by high power transmitter, and transmitting subscriber traffic to multiple base station sites continuously around the clock. Obviously there is a much greater potential for interference from this type of operation to fixed receivers on the mobile channel. We request comment on the continued need for this rule, on what role it may play in the current environment, and whether additional technical parameters or duty cycle limits should be imposed to provide protection for fixed receivers.

§ 22.577 Grandfathered dispatch service.

This proposed rule, presently § 22.519, has been revised to state more clearly that only carriers who have continuously provided service since they received authorization to do so (prior to January 1, 1982) may continue to provide such service. We seek to determine whether any carriers are in fact providing dispatch service. If no carriers are providing such service pursuant to this rule, we propose to eliminate the rule.

§§ 22.625 and 22.627

These proposed rule sections contain technical requirements designed to prevent interference to UHF television from point-to-multipoint stations. The existing graphs in the rules were converted to tables, and provisions related to mobile transmitters were removed, as there are no mobile transmitters in point-to-multipoint operation.

§§ 22.657 and 22.659

These proposed rule sections contain technical requirements designed to prevent interference to UHF television from trunked mobile stations. The existing graphs in the rules were converted to tables, and provisions related to cities where these channels are no longer available were removed.

§ 22.715 Technical channel assignment criteria for rural radiotelephone.

Because Rural Radio utilizes the same channels as two-way mobile operations in the Public Land Mobile service, it is necessary that some assignment criteria be applied. We also propose to apply the additional channel policies proposed in § 22.569 to Rural Radio Service. We seek comment on whether these policies, as applied to Rural Radio Service, would be in the public interest.

§§ 22.751, et. seq.

At this time the Commission does not have any technical rules for assignment of channels to BETRS in the Rural Radio Service. Because BETRS use the same channels as stations in the Public Land Mobile service, we believe that some technical rules are necessary to protect BETRS and paging and radiotelephone stations from mutual interference. In recent years, channel assignments for stations in the Rural Radio Service have been made using the criteria for the Public Land Mobile Service. We request comments as to what additional rules are necessary to govern channel assignments for BETRS, and what technical criteria should be used.

§ 22.757 Channels for basic exchange telephone radio systems.

This rule lists channel groups in the 816-865 MHz for BETRS. However, it has come to our attention that there are few, if any, locations available for BETRS under the distance limitations needed to protect private radio systems. No applications have been filed for these channels. We seek comment as to whether viable locations are available for BETRS use of these channels under the rules and whether any demand for BETRS exists in these locations. If no locations are available or no demand exists for BETRS on these

channels, we propose to remove them from the BETRS rules and request comment on possible other Public Mobile Services utilizations for these channels.

§ 22.813 Technical assignment criteria.

This proposed rule, which would establish technical assignment criteria for channels used to provide 450 MHz air-ground service, would replace the allotment table in § 22.521(b) governing the locations and channels of ground stations. Under the current rules, applicants seeking to locate a ground station anywhere except for the designated locations in the table are required to petition for a change in the table (requiring a rule making proceeding). The proposed rule seeks to simplify and streamline the procedure for obtaining authorization for new or different locations for service. The proposed rule would establish distance separation criteria for co-channel ground stations and requirements limiting to six the number of channels within a 320 kilometer radius of the proposed antenna location. Under the proposed rules, parties wishing to use a new or different location could apply for it without the need for rule making. Action on such applications would be taken at the staff level. Although allotment tables were an efficient way of meeting various goals during the initial establishment of the air-ground service, the benefits have diminished as the service matured while the procedures remain relatively burdensome for the Public Mobile Services. The general aviation air-ground service was established in the 1960's and is now mature. We believe that the proposed rules would ensure that nationwide coverage is maintained, while allowing more flexibility for licensees to respond to local air-ground markets.

§ 22.817 Additional channel policies.

This proposed rule governs the processing of applications for additional ground station channels to provide 450 MHz air-ground service. It is similar to our policy for paging systems, in that we propose to assign only one channel in an area per application cycle (up to a maximum of six ground station channels for any one licensee in an area). This policy is intended to promote competition and to prevent warehousing. Also, similar to proposed rule § 22.539, this proposed rule contains provisions to ensure that the "one channel at a time" policy is followed. We propose that any mutually exclusive applications to provide 450 MHz air-ground service be processed on a "first come, first served" basis. Mutually exclusive applications filed on the same day would be included in a random selection process.

§ 22.819 AGRAS compatibility requirement.

We propose to update our rules to require the technical and operational compatibility specifications currently used by the vast majority of stations providing general aviation air-ground service in the 450 MHz frequency range. All stations would be required to comply with the technical and operational requirements contained in the document "Technical Reference, Air-ground Radiotelephone Automated Service (AGRAS), System Operation and Equipment Characteristics" dated April 12, 1985. As for any stations that may still be operating under the original technical standards, we propose to allow them to do so until January 1, 1994. We seek comment as to whether there are any stations still operating under the original standards.

§§ 22.857, et. seq.

These rules conform to the rules established in the proceeding Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, 6 FCC Rcd 4582 (1991).

§ 22.901 Cellular service.

We propose to consolidate in this rule the existing requirement that cellular licensees provide service to subscribers in good standing, and other rules related to service provided by cellular carriers. This proposed rule also includes special provisions for alternative cellular technologies and auxiliary service, contained currently in § 22.930. In this regard, we propose to eliminate the restriction limiting fixed service to Basic Exchange Telecommunications Radio systems (BETRS). Because of this limitation, carriers currently wishing to provide a fixed-incidental service with compatible equipment must request a waiver to permit such use. We routinely grant such waivers, and can not envision a circumstance under which we would deny such a waiver. Thus it appears that the restriction on incidental fixed services is unnecessary. Carriers desiring to provide an incidental fixed service must comply with state certification requirements, if any. See Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Telecommunications Service, 5 FCC Rcd 1138, 1141 n.14 (1990).

§ 22.905 Channels for cellular service.

We are proposing to eliminate the wireline carrier set-aside provisions of current § 22.902. These set-aside provisions for separate wireline and non-wireline chan-

nels applied only to initial authorizations for the MSAs, NECMAs and RSAs. Once both eligible carriers in these markets have been authorized, the purpose of the set-aside has been served and the maintenance of the set-aside rule is no longer justified. See James F. Rill, 60 RR 2d 583, 592-94 (1986). This proposal is consistent with our action in Unserved Areas (First Report and Order), where we eliminated the set-aside in unserved cellular areas.

§ 22.909 Cellular market areas.

We are proposing to delete the list of the top-30 cellular MSA markets from our rules. There is no reason why this information must be codified in our rules. To ensure that this information is available to the public, the MSD staff recently issued a Public Notice listing all of the cellular markets with the appropriate counties involved. See Public Notice, "Cellular MSA/-RSA Markets and Counties," Mimeo No. 21538 (January 24, 1992).

§ 22.913 Effective radiated power limits.

We propose to eliminate the current provision of § 22.905, that exempts base transmitters from the height-power limitations if coordination with other licensees is carried out. In view of the Commission's decision in Liberalization of Technology and Auxiliary Service Offerings in the Cellular Radio Service (Auxiliary Cellular Order), 3 FCC Rcd 7033 (1988), recon., 5 FCC Rcd 1138 (1990), increasing base station maximum power from 100 to 500 watts, we believe this exemption is no longer appropriate.

§ 22.919 Electronic serial numbers.

This new rule is proposed to help reduce fraudulent use of cellular equipment caused by tampering with the Electronic Serial Numbers (ESN) that identify mobile equipment to cellular systems. According to one industry estimate, cellular carriers lost over $100 million to this type of fraud in 1990. The Commission believes that reducing this type of fraud is in the public interest because such losses, if allowed to continue unabated, will eventually affect carriers' abilities to continue to provide affordable rates. The proposed rule establishes anti-fraud technical specifications for mobile equipment.

§ 22.935 Evaluation of cellular applications.

We propose to revise current § 22.916 which delineates the hearing designations procedures for cellular applications. In particular, we propose to delete paragraphs (a)(1)-(a)(4), which are applicable only to the top-30 cellular markets. The remainder of those rules, paragraphs 22.916(b)(5)-(b)(9) will be utilized in the hearing procedures for cellular renewal challenges. See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service (Report and Order), 7 FCC Rcd 719 (1992).

§ 22.937 Demonstration of financial qualifications.

We propose to revise our financial requirement rules to eliminate the separate financial requirements currently applicable to the top-120 markets, markets beyond the top-120, and the rural service areas. Instead, we are replacing these rules with uniform financial requirements that model the rules recently adopted in Unserved Areas (First Report and Order), 6 FCC Rcd 6185 (1991). The proposed rules would apply to all applications for initial cellular systems. However, for those RSA markets with initial authorizations that are subject to further lotteries, we propose a rule providing that the rules in effect at the time the RSA applications were filed will govern the outstanding RSA proceedings. (See proposed § 22.959.)

§ 22.941 System identification numbers.

We propose to modify the present procedure for changing cellular System Identification Number codes (SID codes). By way of background, in the early 1980's the Electronic Industries Association (EIA) requested the Commission to assign SID codes on initial cellular licenses. It is necessary that each system have a SID code that is unique throughout the country in order for mobile subscriber equipment to be able to tell whether it is in communication with the system to which it is a subscriber, or alternatively, whether it is considered to be a roamer. See Public Notice, "Common Carrier Public Services Information," Mimeo No. 404 (October 24, 1983). The MSD has been assigning SID codes as a license term since then. However, licensees frequently seek to change the initially assigned SID code in order to consolidate territory or to implement "home roaming" agreements. As no procedures have been formally developed for SID code changes, licensees seeking to change their SID codes currently write a letter to MSD requesting the change. The MSD then issues a modified authorization listing the changed SID code. The licensee must receive this modified authorization before using the new code. Under the new rule that we are proposing, system operators could change their SID code at will, and would be required only to notify the Commission by filing an FCC Form 489 that

the SID code is changed. The new procedure would require a SID code change to be handled in the same way as any other minor modification. We realize that some parties have informally opposed the idea to notify the Commission of SID code changes on Form 489, because it would entail paying a processing fee for a service that is currently provided free, and because they believe that it would increase the information collection burden. We disagree that the rule we propose would be more burdensome than the current procedures. However, we believe that it is not essential that the Commission be the organization to assign these codes. There are no public interest issues involved in the assignment of SID codes, and there is no particular reason that SID codes must be a term of cellular authorizations. It might be more efficient and less burdensome if a private national cellular industry organization were to assign these codes outside of the FCC licensing process. Therefore, in the alternative to our proposal, we also seek comment on this possibility.

§ 22.947 Five year fill-in period.

This proposed rule is intended to consolidate all current rules relating to the five year fill-in period for first-in-market cellular systems in the MSAs and RSAs; for example, the rule requiring the filing of a system information update. Also, it is proposed to codify existing practice with regard to "partitioned RSAs", which are RSAs where the first licensee has allowed one or more additional carriers to establish independently authorized cellular systems within the market during the five year fill-in period.

§ 22.949 Unserved area licensing phases, procedures and filing windows.

The purpose of this proposed rule section is to consolidate the rules governing the filing and processing of unserved area cellular applications. We note that, as of the time the MSD staff drafted this Notice of Proposed Rule Making, petitions for reconsideration are pending in CC Docket No. 90-6. While the proposals herein represent our thinking as to the organization of cellular rules, it should be understood that substantive issues currently under consideration in other proceedings (such as CC Docket No. 90-6) will be resolved based on the record of those proceedings, and any rules finally adopted in this proceeding will be conformed to any decisions reached in the other proceedings. Thus, this Notice is not intended to provide a "second bite at the apple" and it is not necessary or desired that parties refile comments from other concurrently pending proceedings.

§ 22.955 Canadian condition.

We propose to codify a provision of the most recent agreement between the United States and Canada specifying that authorizations for cellular systems within 72 kilometers (45 miles) of the United States-Canada border using the same channel block as cellular systems in adjacent territories in Canada shall include a condition on the authorization requiring the licensee to coordinate transmitter installations with the licensees operating the Canadian cellular systems. This condition is intended to eliminate harmful interference and ensure equal use of the channel block by both countries.

§ 22.957 Mexican condition.

We also propose to codify a provision of the most recent agreement between the United States and Mexico that includes provisions similar to the Canadian condition noted above. In addition, the condition states that United States cellular system operators shall not contract with Mexican customers and that operation of mobile units in Mexico is not permitted without the permission of the Mexican government.

§ 22.959 Rules governing initial cellular systems.

Because we propose to eliminate many of the detailed rules governing the processing of initial cellular authorizations, we also propose to adopt a new rule providing that any remaining pending applications for initial cellular authorizations will continue to be processed in accordance with the rules that were in effect at the time the applications were filed.

Proposed Revisions of FCC Forms 401, 489 and 490

The proposed rewrite of Part 22 entails substantial changes to FCC Forms 401, 489 and 490. These changes have several purposes: 1) to conform to proposed changes in Part 22; 2) to prepare for future magnetic and electronic filing; 3) to simplify the forms; 4) to consolidate the purposes for which the forms are to be used. The newly designed forms are structured with modules that correspond to tables in future relational data bases. By receiving the necessary information in this format, the MSD staff will be able to enter the data more easily, and thus reduce the time needed to process applications while, at the same time, maintaining the integrity of the data bases. With respect to the changes to FCC Form 489, we point out that although Form 489 was initially designed to notify the Commission of the status of PMS facilities, over the years the form has become a "catch-all" for notifications

and requests that do not require Public Notice. We intend that Form 489 be used for notifications and Form 401 be used for applications, amendments and other requests requiring a Commission action or response. Note however, that the fee amounts for the various types of filings will not change as a result of a change in the required form. The certifications of some of the forms are strengthened to reflect a greater responsibility for the correctness of technical exhibits. A certification regarding denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988 (21 U.S.C. 862a) is added. FCC Form 155 (Fee collection) is incorporated into each of the three forms, as required by the Office of Management and Budget. Finally, we note that Telocator and CTIA have requested the elimination of several information collection requirements in these forms, and we have tried to accommodate as many of these requests as possible.

Proposed Changes to FCC Form 401

1. Combine Tables MOB-1A and MOB-1B in Item 9. We propose that these tables be combined because they are redundant.

2. Remove Item 22. We propose to remove Item 22, which requires that applicants list the exhibits that are attached to the application, because we generally do not use this information. If a required exhibit is missing when an application is filed, the application is unacceptable for filing and/or defective regardless of whether Item 22 is completed to indicate it should have been attached.

3. Place instructions section of Item 33 on the Instructions to FCC Form 401. We propose that all instructions be combined into the main form instructions.

4. Modifications to Item 33, Table MOB-2 Antennas, Radiation and Points of Communication. We propose to remove 33i, Polarization, because this information is unnecessary; remove 33j(3), Emission Designators, except when using non-standard emission designators; and combine 33j(5-7), Transmitters continued, with Item 38, Table MOB-4, Location of Fixed Antennas Regularly Receiving Signals of the Station. In addition, we propose to remove 33e and 33j(4) because the information is no longer required by the proposed rules. We also propose to remove 33j(6) and (7) because the information can be calculated from other information provided on the form.

5. Add option to Item 35, Antenna Structure Statement, to read "On building, not exceeding 6.1 meters (20 Feet)". We propose that this information be included in Item 35 to aid the MSD staff in processing applications more efficiently.

6. Eliminate Item 35(g), Aeronautical Hazards. This item is removed because the information requested is not necessary.

7. Eliminate Item 36, Vertical Profile Sketch of Antenna Structure. We propose to eliminate the space on the form for the antenna structure sketch because it is not needed for most antenna structures and when it is necessary, it can be presented on an otherwise blank sheet of paper as an exhibit.

8. Modifications to Item 37, Table MOB-3, Height and Power Engineering Data. In this Item, we eliminate (b) Average Elevation Along Radial Above Mean Sea Level and (c) Height of Antenna Radiation Center Above Average Elevation of Radial because this information can be obtained from available databases and calculations; eliminate (e) Distance to Reliable Service Area Contour and (f) Average Terrain Elevation because this is calculated from other information provided in the form; eliminate (h), which is associated with (b), information which is no longer necessary; and eliminate (i) which asks whether an antenna is omnidirectional and mounted at the top of the antenna structure.

9. Add to Item 27 request for current geographical coordinates and FCC location number. This information will assist the MSD staff in accurately processing relocated antennas.

10. Expand the options for indicating the nature of the application or amendment. The options are grouped by radio service and by whether the filing would be classified as major or minor. This will help the MSD staff process the filing more expeditiously.

Proposed Changes to FCC Form 489

1. Remove Item 7b to Form 401. Item 7b is for applicants requesting an extension of time to complete construction of their facilities. In view of our intent that Form 489 be used for notification purposes and that Form 401 be used for request purposes, we moved this to Form 401.

2. Remove Item 7c. Under the current rules, item 7c must be checked if the application is being submitted within 30 days after expiration of the authorization and reinstatement is requested. This information would

no longer be relevant if we adopt our proposal to eliminate the rule allowing reinstatement.

3. Add an option for partial completion of construction. We propose to add an option to Item 6 allowing applicants to notify the Commission that only part of the facilities have been constructed. This information will assist the MSD staff in processing applications more efficiently.

4. Remove Items 9, 10 and 11. These items concern extensions of time to complete construction (items 9 and 10) and requests for reinstatements (item 11), both of which we propose to remove from Form 489. As proposed, requests for extensions of time will be filed on Form 401. As noted above, we are proposing to delete the rules allowing reinstatements.

5. Remove Items 13, 14 and 16 to Form 401, Schedule B. Items 13, 14 and 16 concern requests for modifications of facilities. Schedule B will continue to be attached to Form 489 when required.

6. Remove Items 12 and 17. Item 12 questions whether the representations contained in the granted application are still true and correct. Item 17 questions whether there has been any changes to the information in the application for authorization covering ownership, citizenship, station control, business connection and monopoly practices. If any of this information has changed, the applicant would reflect these changes on Forms 401 and 490.

7. Remove Items 18 and 19. Item 18 questions whether the application is for modification of license. Item 19 questions whether the applicant has been denied state certification for the facilities proposed in the application. Affirmative responses to both items require that exhibits be submitted. However, the information required by these exhibits would already be on file in the applicant's Form 401. Therefore, we propose to delete these items from Form 489.

Proposed Changes to FCC Form 490

All requirements for the submission of exhibits are moved to the instructions. The instructions to the form will specify what, if any, exhibits should be submitted.

APPENDIX B

Proposed Rules

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.420 is amended (to remove all references to the air-ground table of allotments - specific amendatory language to be provided at final rule publication).

3. In the first sentence of the introductory text of Section 1.742, the phrase "Except as specified in § 22.6" is revised to read "Except as specified in Part 22".

4. Section 1.821 is revised to read as follows:

§ 1.821 Scope.

The provisions of §§ 1.822, 1.823, 1.824 and 1.825 apply as indicated to those applications for permits, licenses or authorizations in the Public Mobile Services, Multichannel Multipoint Distribution Service and Digital Electronic Message Service for which action may be taken by the Chief, Common Carrier Bureau pursuant to delegated authority.

5. Section 1.823 is amended by revising the headnote and paragraph (b) to read as follows:

§ 1.823 Random selection procedures for the Public Mobile services.

* * * * *

(b) * * *

(1) Public Mobile Services other than the Cellular Radiotelephone Service. Petitions to Deny and other pleadings may be filed against applications but are not reviewed prior to the random selection process. Petitions filed against tentative selectee applications are reviewed after the tentative selectee is announced.

(2) Cellular Radiotelephone Service, except unserved areas. * * *

(3) Cellular Radiotelephone Service, unserved areas. * * *

* * * * *

6. Section 1.1105 is amended (to conform terminology in the fee schedule - specific amendatory language to be provided at final rule publication).

7. Part 22 is revised to read as follows:

PART 22 - PUBLIC MOBILE SERVICES

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ALPHABETICAL INDEX-PART 22

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

Subpart A - Scope and Authority

§ 22.1 Basis and purpose.

This section contains a concise general statement of the basis and purpose of the rules in this part, pursuant to 5 U.S.C. 553(c).

(a) Basis. These rules are issued pursuant to the Communications Act of 1934, as amended, 47 U.S.C. 151 et. seq.

(b) Purpose. The purpose of these rules is to establish the requirements and conditions under which domestic common carrier radio stations may be licensed and used in the Public Mobile Services.

§ 22.3 Authorization required.

Stations in the Public Mobile Services must be used and operated only in accordance with the rules in this part and with a valid authorization granted by the Commission under the provisions of this part.

(a) The holding of an authorization does not create any rights beyond the terms, conditions and period specified in the authorization. Authorizations may be granted upon proper application, provided that the Commission finds that the applicant is qualified in regard to citizenship, character, financial, technical and other criteria, and that the public interest, convenience and necessity will be served. See 47 U.S.C. 301, 308, and 309.

(b) Authority for subscribers to operate mobile or fixed stations in the Public Mobile Services, except for certain stations in the Rural Radiotelephone Service and the Air-ground Radiotelephone Service, is included in the authorization held by the common carrier providing service to them. Subscribers are not required to apply for, and the Commission does not accept applications from subscribers for, individual mobile or fixed station authorizations in the Public Mobile Services, except as follows:

(1) Individual authorizations are required to operate general aviation airborne mobile stations in the Air-Ground Radiotelephone Service. See § 22.821.

(2) Individual authorizations are required to operate rural subscriber stations in the Rural Radiotelephone Service, except as provided in § 22.703.

§ 22.5 Citizenship.

The rules in this section implement § 310 of the Communications Act of 1934, as amended (47 U.S.C. 310), in regard to the citizenship of licensees in the Public Mobile Services.

(a) Foreign governments. The Commission will not grant an authorization in the Public Mobile Services to any foreign government or any representative thereof.

(b) Alien ownership or control. The Commission will not grant an authorization in the Public Mobile Services to:

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

§ 22.7 General eligibility.

Except as otherwise provided in this part, existing and proposed common carriers are eligible to apply for authorizations in the Public Mobile Services. Applications are granted only if the applicant is legally, financially, technically and otherwise qualified to render the proposed service, there are sufficient channel assignments available to enable the applicant to render a satisfactory service, and the public interest, convenience and necessity would be served by a grant thereof.

§ 22.99 Definitions.

Terms used in this part have the following meanings:

Air-Ground Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide radiotelephone service for hire to subscribers in aircraft.

Airborne station. A mobile station in the Air-ground Radiotelephone Service authorized for use on aircraft in flight.

Antenna structure. A structure comprising an antenna, the tower or other structure that exists solely to support antennas, and any surmounting appurtenances (attachments such as beacons or lightning rods).

Antenna. A device that converts radio frequency electrical energy to radiated electromagnetic energy and vice versa; in a transmitting station, the device from which radio waves are emitted.

Archival quality microfiche. A silver halide master microfiche or a copy made on silver halide film.

Assignment of authorization. A transfer of a Public Mobile Services authorization from one party to another, voluntarily or involuntary, directly or indirectly, or by transfer of control of the licensee.

Authorization. A written instrument issued by the Commission conveying authority to operate, for a specified term, a station in the Public Mobile Services.

Authorized bandwidth. The spectral width of that portion of the electromagnetic spectrum within which the emission power of the authorized transmitter(s) must be contained, in accordance with the rules in this part. An authorized bandwidth comprises one channel bandwidth or the bandwidths of two or more contiguous channels.

Auxiliary test transmitter. A fixed transmitter used to test Public Mobile systems.

Base transmitter. A stationary transmitter that provides service to mobile stations.

Blanketing interference. Disturbance in consumer receivers located within the near vicinity of a transmitter caused by currents directly induced into the consumer receiver's circuitry by the relatively high field strength of the transmitter.

Cardinal radials. Eight imaginary straight lines extending radially on the ground from an antenna location in the following azimuths with respect to true North: 0°, 45°, 90°, 135°, 180°, 225°, 270°, 315°.

Carrier frequency. The frequency of the unmodulated electrical wave at the output of an AM or FM transmitter.

Cell. The service area of an individual transmitter location in a cellular system.

Cellular Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide cellular service for hire to the general public. This service was formerly titled Domestic Public Cellular Radio Telecommunications Service.

Cellular repeater. In the Cellular Radiotelephone Service, a stationary transmitter or device that automatically re-radiates the transmissions of base transmitters at a particular cell site and mobile stations communicating with those base transmitters, with or without channel translation.

Cellular service. Radio telecommunication services provided using a cellular system.

Cellular system. An automated high-capacity system of one or more multichannel base stations designed to provide radio telecommunication services to mobile stations over a wide area in a spectrally efficient manner. Cellular systems employ techniques such as low transmitting power and automatic hand-off between base stations of communications in progress to enable channels to be reused at relatively short distances. Cellular systems may also employ digital techniques such as voice encoding and decoding, data compression, error correction, and time or code division multiple access in order to increase system capacity.

Center frequency. The frequency of the middle of the bandwidth of a channel.

Central office transmitter. A fixed transmitter in the Rural Radiotelephone Service that provides service to rural subscriber stations.

Channel bandwidth. The spectral width of a channel, as specified in this part, within which 99% of the emission power must be contained.

Channel block. In the Cellular Radiotelephone Service and the Air-ground Radiotelephone Service, a group of channels assigned together.

Channel. The portion of the electromagnetic spectrum assigned by the Commission for one emission. However, in certain circumstances, more than one emission may be transmitted on a channel. See, for example, § 22.161 and § 22.757, et seq.

Communications channel. In the Cellular Radiotelephone and Air-ground Radiotelephone Services, a channel used to carry subscriber communications.

Construction period. The period between the date of grant of an authorization and the date of required commencement of service.

Control channel. In the Cellular Radiotelephone and Air-ground Radiotelephone services, a channel used to transmit information necessary to establish or maintain communications. In the other Public Mobile Services, a channel that may be assigned to a control transmitter.

Control point. A location where the operation of a public mobile station is supervised and controlled by the licensee of that station.

Control transmitter. A fixed transmitter in the Public Mobile Services that transmits control signals to one or more base or fixed stations for the purpose of controlling the operation of the base or fixed stations, and/or transmits subscriber communications to one or more base or fixed stations that retransmit them to subscribers.

Dead spots. Small areas within a protected service area where the field strength is lower than the minimum level for reliable service. Service within dead spots is presumed.

Effective radiated power (ERP). The effective radiated power of a transmitter (with antenna, transmission line, duplexers etc.) is the power at the input terminals of a reference half-wave dipole antenna that would produce the same maximum field intensity.

Emission designator. An internationally accepted symbol for describing an emission in terms of its bandwidth and the characteristics of its modulation, if any.

Emission mask. The design limits imposed, as a condition for type acceptance, on the mean power of emissions as a function of frequency both within the authorized bandwidth and in the adjacent spectrum.

Emission. The electromagnetic energy radiated from an antenna.

Equivalent isotropically radiated power (EIRP). The equivalent isotropically radiated power of a transmitter (with antenna, transmission line, duplexers etc.) is the power at the input terminals of a

reference isotropic radiator that would produce the same maximum field intensity.

Facsimile service. Transmission of still images from one place to another by means of radio.

Fill-in transmitters. In the Cellular Radiotelephone Service, transmitters added to the first cellular system authorized on a channel block in a cellular market during the five year fill-in period in order to expand the coverage of the system within the market. In the Paging and Radiotelephone Service, transmitters added to a station, in the same area and transmitting on the same channel as previously authorized transmitters, for the purpose of improving reception in dead spots.

Five year fill-in period. A five year period during which the licensee of the first cellular system authorized on each channel block in each cellular market may expand the system within that market. See § 22.947.

Fixed transmitter. A stationary transmitter that communicates with other stationary transmitters.

Frequency. The number of cycles occurring per second of an electrical or electromagnetic wave; a number representing a specific point in the electromagnetic spectrum.

Ground station. In the Air-ground Radiotelephone Service, a stationary transmitter that provides service to airborne mobile stations.

Height above average terrain (HAAT). The height of an antenna above the average elevation of the surrounding area.

In-building radiation systems. Supplementary systems comprising low power transmitters, receivers, indoor antennas and/or leaky coaxial cable radiators, designed to improve service reliability inside buildings or structures located within the service areas of stations in the Public Mobile Services.

Initial applications. Applications for authority to operate the first cellular system on a channel block in a cellular market.

Interfering contour. The locus of points surrounding a transmitter where the predicted median field strength of the signal from that transmitter is the maximum field strength that is not considered to cause interference at the service contour of another transmitter.

Interoffice transmitter. A fixed transmitter in the Rural Radiotelephone Service that communicates with other interoffice transmitters for the purpose of interconnecting rural central offices.

Meteor burst propagation mode. A long distance VHF radio communication path occurring as a result of the refraction of electromagnetic waves by ionized meteor trails.

Mobile station. One or more transmitters that are capable of operation while in motion.

Necessary bandwidth. The calculated spectral width of an emission. Calculations are made using formulas set forth in Part 2 of this chapter. The bandwidth so calculated is considered to be the minimum necessary to convey information at the desired rate with the desired accuracy.

Occupied bandwidth. The measured spectral width of an emission. The measurement determines occupied bandwidth as the difference between upper and lower frequencies where 0.5% of the emission power is above the upper frequency and 0.5% of the emission power is below the lower frequency.

Offshore central transmitter. A fixed transmitter in the Offshore Radiotelephone Service that provides service to offshore subscriber stations.

Offshore Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers on structures in the offshore coastal waters of the Gulf of Mexico.

Offshore subscriber station. One or more fixed and/or mobile transmitters in the Offshore Radiotelephone Service that receive service from offshore central transmitters.

Pager. A radio receiver that can be carried by a person and is designed to give an aural, visual or tactile indication when activated by the reception of a radio signal containing its specific code. It may also reproduce sounds and/or display messages, if these were also transmitted. It may also transmit a radio signal acknowledging that a message has been received.

Paging and Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide paging and radiotelephone service for hire to the general public. This service was formerly titled Public Land Mobile Service.

Paging service. Transmission of brief coded radio signals for the purpose of activating specific pagers; such transmissions may include brief messages and/or sounds.

Partitioned RSA. A Rural Service Area with two or more authorized cellular systems on the same channel block during the five year fill-in period, as a result of contract(s) between the licensee of the first cellular system and the licensee(s) of the subsequent systems. See § 22.947(b).

Public Mobile Services. Radio services in which common carriers are authorized to offer and provide mobile and related fixed radio telecommunication services for hire to the public.

Radio common carrier. A telecommunications common carrier that is not also engaged in the business of providing landline local exchange telephone service.

Radio telecommunication services. Communication services provided by the use of radio, including radiotelephone, radiotelegraph, and facsimile service.

Radiotelegraph service. Transmission of messages from one place to another by means of radio.

Radiotelephone service. Transmission of sound from one place to another by means of radio.

Repeater. A fixed transmitter that retransmits the signals of other fixed stations.

Roamer. A mobile station receiving service from a station or system in the Public Mobile Services other than one to which it is a subscriber.

Rural Radiotelephone Service. A radio service in which common carriers are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means.

Rural subscriber station. One or more fixed transmitters in the Rural Radiotelephone Service that receive service from central office transmitters.

Service area. The geographic area considered by the Commission to be reliably served by a station in the Public Mobile Services.

Service contour. The locus of points surrounding a transmitter where the predicted median field strength of the signal from that transmitter is the minimum field strength that is considered sufficient to provide reliable service to mobile stations.

Telecommunications common carrier. An individual, partnership, association, joint-stock company, trust or corporation engaged in rendering telecommunications services to the general public for hire.

Temporary fixed station. One or more fixed transmitters that normally do not remain at any particular location for longer than 6 months.

Transfer of control. A transfer of the controlling interest in a Public Mobile Services licensee from one party to another.

Wireline common carrier. A telecommunications common carrier that is also engaged in the business of providing landline local exchange telephone service.

Subpart B - Application Requirements and Procedures

§ 22.101 Station files.

Applications, notifications, correspondence and other material, and copies of authorizations, comprising technical, legal, and administrative data relating to each station in the Public Mobile Services are maintained in individual station files. These files constitute the official records for these stations and supersede any other records, data bases or lists from the Commission or other sources. Station files are available for public inspection in the Mobile Services Division Public Reference Room, 1919 M Street N.W., Washington, DC.

§ 22.103 Representations.

Parties must make full and continuing disclosure as required by § 1.65 of this chapter. Parties must not make misrepresentations. The signing of an application or notification for new or additional facilities in the Public Mobile Services constitutes a representation that the applicant intends to use such facilities to provide service to the public in accordance with the rules in this part.

§ 22.105 Written applications, standard forms, microfiche, magnetic disks.

Except for authorizations granted under the emergency conditions set forth in § 308 of the Communications Act of 1934 (47 U.S.C. 308), the Commission may grant authorizations only upon written application received by it. A separate written application is required for each authorization. Applicants shall submit any documents, exhibits, or other written statements of fact that the Commission may require in determining whether to grant, deny or dismiss an application.

(a) Formal applications, amendments and notifications. Except as provided in paragraph (b) of this section, applications, amendments and notifications must be filed using the standard forms listed in paragraph (c) of this section.

(b) Informal applications, amendments and notifications. Applications, amendments and notifications in letter or document form may be accepted for filing, if none of the standard forms listed in this section are prescribed for or clearly applicable for the intended purpose. Such informal applications, amendments and notifications must be submitted in duplicate, with a caption clearly stating the name of the filer, nature of the filing, the Public Mobile service involved, the call sign of the relevant existing station, if any, and the file number of the relevant pending application, if any, and must contain all necessary technical data and exhibits.

(c) Standard forms. Standard forms may be obtained in small quantities from the FCC. Standard forms may be reproduced and the copies used. Computer-generated standard forms may also be used after approval by the Commission staff. Standard forms used for applications, amendments, notifications and reports in the Public Mobile Services are listed in Table B-1.

(d) Microfiche required. All filings and submissions related to stations in the Public Mobile Services, such as applications (including exhibits and attachments), notifications, amendments, reports, correspondence and pleadings must be submitted in microfiche form, except as provided in paragraphs (d)(1) and (g) of this section.

(1) Emergency filings, such as requests for special temporary authority, need not be submitted in microfiche form. Filings and submissions (other than standard application forms) that are no longer than three pages need not be submitted in microfiche form. Standard application forms must be submitted in microfiche form, even if they comprise three pages or less.

(2) Three microfiche copies of each filing or submission must be submitted. Each microfiche copy must be a complete copy of the signed paper original. Each microfiche must be a 148mm by 105mm negative (clear transparent characters appearing on a black background) at 24× or 27× reduction. At least one of the microfiche copies must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. Microfiche must be placed in paper microfiche envelopes and submitted in a 5" by 7½" envelope. Applicants must leave Row "A" (the first row for page images) of the first microfiche blank for Commission use.

(3) The following information must be printed on the mailing envelope, the microfiche envelope, and the title area at the top of the microfiche:

(i) for applications other than initial applications in the Cellular Radiotelephone Service, notifications, amendments, reports, correspondence, and pleadings - the name of the applicant, the city and state of the application and the call sign of the station, if the application refers to an existing station.

(ii) for initial applications in the Cellular Radiotelephone Service - the name of the applicant, the market name, the market number, and the channel block.

Table B-1 - Standard Forms for the Public Mobile Services

Purpose of Filing	Form Number	Title of Form
• application for new or modified station • major amendment to pending application • application for partial assignment of authorization	401	Application for Public Mobile Services Radio Station Authorization
• application for renewal of authorization	405	Application for Renewal of Station License
• application for airborne mobile authorization	409	Application for Airborne Mobile Radiotelephone Authorization
• qualification of new common carrier	430	Common Carrier and Satellite Radio Licensee Qualification Report
• notification of completion of construction • notification of minor modification of station	489	Notification of Status or Minor Modification of Public Mobile Services Station
• application for assignment of authorization • application for approval of transfer of control	490	Application for Assignment or Transfer of Control of Public Mobile Services Station

(e) Paper original required. Except for initial applications in the Cellular Radiotelephone Service, the paper originals of applications, notifications, amendments, reports, correspondence, and pleadings must be submitted at the same time as the microfiche required by paragraph (d) of this section. Each paper original must be stamped "ORIGINAL" on the top page. In addition to the paper original, paper copies of pleadings must be submitted as required by § 1.51 of this chapter.

(f) Correspondence. Correspondence concerning a submitted application must clearly identify the name of the filer, nature of the filing, the Public Mobile service involved, the call sign of the relevant existing station, if any, and the file number of the relevant pending application. Correspondence may be sent directly to Mobile Services Division, Common Carrier Bureau, Federal Communications Commission, Washington, DC 20554.

(g) Magnetic disks. To assist the Commission in maintaining an accurate technical licensing database, applicants are encouraged to submit the technical and administrative data contained in applications and notifications on magnetic disks. Applicants may also submit, in lieu of the microfiche required by paragraph (d) of this section, entire applications and notifications on magnetic disks, by including graphics files containing the images of the signed paper originals.

(1) Each application must be submitted on a separate labeled standard 3½" magnetic disk, formatted to be readable by high-density floppy drives operating under MS-DOS (3.X or later versions). A copy of each disk must also be submitted (2 identical disks per application).

(2) Each technical and administrative data item should be written to a file as an ASCII string, preceded by the appropriate mnemonic, and terminated by carriage return (H0D).

(3) Images should be contained in files conforming to one of the following standard graphics file formats: TIF, CGM.

(4) A bulletin listing the appropriate mnemonics and providing other details for filing Public Mobile Services applications on magnetic disks is available from the Consumer Assistance and Small Business Division, Office of Public Affairs, Federal Communications Commission, Washington, DC 20554.

§ 22.106 Filing fees; place.

Applications, amendments, notifications and other filings must be submitted to the Commission at the appropriate address, with the appropriate filing fee. The fee amounts and addresses are listed in Part 1, Subpart G of this chapter (§ 1.1105 in particular), and in the publication "Common Carrier Services Fee Filing Guide" which is available from the Consumer Assistance and Small Business Division, Office of Public Affairs, Federal Communications Commission, Washington, DC 20554.

§ 22.107 General application requirements.

In general, applications for authorizations or approval of assignments of authorizations in the Public Mobile Services must:

(a) demonstrate the applicant's qualifications to hold an authorization in the Public Mobile services;

(b) state how a grant would serve the public interest, convenience, and necessity;

(c) contain all information required by the Commission's rules or application forms;

(d) propose operation of a facility in compliance with all rules governing the Public Mobile service; and,

(e) be amended as necessary to remain substantially accurate and complete in all significant respects, in accordance with the provisions of § 1.65 of this chapter.

§ 22.108 Parties to applications.

Each application for an authorization or for approval of an

assignment of authorization in the Public Mobile Services must disclose fully the real party or parties in interest to the application. Such disclosure must include:

(a) a list of the applicant's subsidiaries, if any. For the purposes of this section, a subsidiary is any business for which the applicant or any officer, director, stockholder or key manager of the applicant owns 5% or more of the stock, warrants, options or debt securities. This list must include a description of each subsidiary's principal business and relationship to the applicant.

(b) a list of the applicant's affiliates, if any. For the purposes of this section, an affiliate is:

(1) any business that holds a 5% or more interest in the applicant; or,

(2) any business in which a 5% or more interest is held by a business that also holds a 5% or more interest in the applicant.

(c) a list of the names, addresses, citizenship and principal business of any person holding 5% or more of each class of stock, warrants, options or debt securities of the applicant, indicating the amount and percentage held, and providing the name, address, citizenship and principal place of business of any person, if other than the holder, for whose benefit such interest is held. If any such persons are related by blood or marriage, the relationship must be disclosed.

§ 22.109 State certification.

Pending applications may be dismissed without prejudice by the Commission if state certification required to construct or operate the proposed facilities has been denied and the state appeal process has been exhausted. Such applications will not be retained in a pending status while the applicant pursues subsequent state applications; furthermore, such applications must not be resubmitted to the Commission until the required state certification has been obtained. Applicants shall promptly and fully advise the Commission of any adverse action taken with regard to state certification for facilities proposed in pending applications. Also, see § 22.142 in regard to extension of construction period pending state certification.

§ 22.115 Content of applications.

Applications must contain all information requested on the standard form and any additional information required by the rules in this part.

(a) The following requirements are common to all Public Mobile Services:

(1) Site availability. At the time of filing, applicants must have obtained reasonable assurance that all antenna sites specified in their applications are available for the proposed use.

(2) Antenna structure drawing. Applications proposing a new antenna structure or a change in the overall height of an existing antenna structure must contain a vertical profile drawing of the antenna structure. (Applications proposing to use an existing structure, without changing the overall height of the structure, need not contain a drawing.) The drawing must be labeled to show the overall structure height including appurtenances, the height of the tip(s) of the proposed antenna(s), the height of any supporting building (or other man-made structure other than an antenna tower), and the ground elevation. Heights must be given in meters above ground level (AGL) and meters above mean sea level (AMSL). The ground elevation must be given in meters AMSL.

(3) FAA notification. Before construction of new antenna structures or increases in the height of existing structures is authorized by the Commission, an FAA determination of No Hazard to Air Navigation may be required. To apply for this determination, applicants must notify the FAA of the planned construction. Criteria used to determine whether FAA notification is required for a particular antenna structure are contained in Part 17, Subpart B of this chapter. Applications proposing a new antenna structure or an increase in the height of an existing antenna structure must state whether FAA notification is required. If available, a copy of the FAA determination should be included in the application. If FAA notification is required, but the FAA determination is not available at the time the application is filed, the application must include the following information in regard to the FAA notification: the name of the person that submitted the notification, the date the notification was submitted, and the location of the FAA office to which the notification was submitted.

(4) Antenna locations. Applications for stations at fixed locations must describe each transmitting antenna site by its geographical coordinates and also by its street address, or by reference to a nearby landmark. Geographical coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude.

NOTE: The FAA has announced that effective October 15, 1992, it will use geographic coordinates based on the 1983 North American Datum (NAD83). Until further notice, however, the FCC will continue to use geographical coordinates based the 1927 North American Datum (NAD27).

(5) Environmental concerns. Each applicant is required to indicate at the time its application is filed whether or not a Commission grant of the application may have a significant environmental effect, as defined by § 1.1307. If answered affirmatively, an Environmental Assessment, required by § 1.1311, must be filed with the application and Commission environmental review must be completed prior to construction.

(b) Reference to material on file. Questions on application forms that call for specific technical data, or can be answered "yes" or "no" or other short answer, must be answered on the form. Otherwise, if documents, exhibits, or other lengthy showings already on file with the Commission contain information required in an application, the application may incorporate such information by reference, provided that:

(1) the referenced information comprises more than one 8½" by 11" page and is current and accurate in all significant respects; and,

(2) the reference states specifically where the referenced information can actually be found, including:

(i) the station call sign or application file number, if the reference is to station files or previously filed applications;

(ii) the title of the proceeding, the docket number, and any legal citations, if the reference is to a docketed proceeding.

(c) Service specific requirements. Applications for authorization

in the Cellular Radiotelephone Service must contain the information required by § 22.929. Applications for authorization in the Paging and Radiotelephone Service must contain the information required by § 22.529. Applications for authorization in the Rural Radiotelephone Service must contain the information required by § 22.709. Applications for authorization in the Offshore Radio Service must contain the information required by § 22.1037. Applications for authorization in the Air-Ground Radiotelephone Service must contain the information required by § 22.849 or § 22.875, as appropriate.

§ 22.119 Requests for rule waivers.

The Commission may waive the requirements of rules in this part on its own motion or upon written request.

(a) Requests for waiver of rules must contain a complete explanation as to why the waiver is desired. The Commission may grant a request for waiver if it is shown that:

(1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(2) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative.

(b) Denial of a rule waiver request associated with an application renders that application defective unless it contains an alternative proposal that fully complies with the rules, in which event the application is processed using the alternative proposal as if the waiver had not been requested. Applications rendered defective may be dismissed without prejudice.

§ 22.120 Application processing; initial procedures.

This section contains rules governing the initial processing of applications for authority to operate a station in the Public Mobile Services.

(a) File numbers. Applications received by the Commission are assigned file numbers. Assignment of a file number to an application is for administrative convenience and does not constitute a determination that the application is acceptable for filing. Assignment of a file number does not preclude the subsequent return or dismissal of an application.

(b) Received date. The Commission records the date on which each application is received. This date is used to determine compliance with applicable cut-off dates or filing windows and for other purposes.

(c) Initial review for completeness (prescreening). Each application is reviewed for completeness. The purpose of this initial review is to identify applications that are defective in an obvious way (e.g. not signed, missing pages, improper or missing fee payment). Applications found to be defective in this review are deemed unacceptable for filing and returned to the applicant with a brief statement indicating the nature of the defect(s) found. Applications for which no obvious defects are discovered in the initial review are deemed tentatively acceptable for filing.

(d) Public notice; tentative acceptance for filing. The Commission periodically issues Public Notices that list applications that are tentatively acceptable for filing. The listing of an application on a Public Notice as tentatively acceptable for filing serves to provide notice to the public that the application has been filed; it does not preclude dismissal of the application if it is subsequently found to be defective.

§ 22.121 Repetitious, inconsistent or conflicting applications.

Repetitious, inconsistent or conflicting applications are not accepted for filing by the Commission. Unless the Commission in a particular case determines otherwise, such applications are not returned to the applicant.

(a) While an application is pending, any subsequent inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing.

(b) If an applicant has been afforded an opportunity for a hearing with respect to an application for a new station or an enlargement of service area, and the Commission has, after hearing or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application for service of the same type to the same area by that applicant, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, until one year after the effective date of the Commission's action on the original application.

(c) If an appeal has been taken from the action of the Commission denying a particular application, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

(d) If an authorization is automatically terminated because of failure to commence service to the public (see § 22.144), the Commission will not consider an application for another authorization to operate a station on the same channel (or, in the case of a 931 MHz paging station, the same frequency range) in the same geographical area by that party, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the terminated authorization, until one year after the date the authorization terminated.

§ 22.122 Amendment of applications.

Pending applications may be amended as a matter of right if they have not been designated for hearing or listed in a Public Notice for a random selection process, except as provided in paragraphs (b) and (c) of this section.

(a) If a petition to deny or other formal objection has been filed, and/or if the Commission has issued a Public Notice stating that the application appears to be mutually exclusive with another application (or applications), a copy of any amendment (or other filing) must be served on the petitioner and/or on any such mutually exclusive applicant (or applicants).

(b) Amendments to applications that resolve mutual exclusivity may be filed at any time, subject to the requirements of § 22.129.

(c) Amendments to applications designated for hearing may be allowed by the presiding officer and amendments to applications selected in a random selection process may be allowed by the

Commission for good cause shown. In such instances, a written petition demonstrating good cause must be submitted and served upon the parties of record.

§ 22.123 Classification of filings as major or minor.

Applications and amendments to applications are classified as major or minor. Categories of major and minor filings are listed in § 309 of the Communications Act of 1934, as amended (47 U.S.C. 309). In general, a major filing is a request for a Commission action that has the potential to affect parties other than the applicant. Filings are minor if they are not classified as major.

(a) Ownership or control change. Filings are major if they specify a substantial change in beneficial ownership or control (de jure or de facto), unless such change is involuntary or if the filing merely amends an application to reflect a change in ownership or control that has already been approved by the Commission.

(b) Developmental. Applications are major if they request a developmental authorization or a regular authorization for facilities operating under a developmental authorization.

(c) Renewal. Applications for renewal of authorizations are major.

(d) Environmental. Filings are major if they request authorization for a facility that would have a significant environmental effect, as defined by § 1.1301 et seq. of this chapter.

(e) Channel usage. Filings are major if they would affect channel usage as follows:

(1) Paging and Radiotelephone, Rural Radiotelephone. In the Paging and Radiotelephone and Rural Radiotelephone services, filings are major if they:

(i) request an authorization that would:

(A) establish for the filer a new service area or fixed transmission path on the requested channel;

(B) extend the service area of an existing station to include area not served by station(s) authorized to the filer on a requested channel;

(C) extend the interfering contours of an existing station beyond the composite interfering contours of station(s) authorized to the filer on a requested channel;

(D) increase the effective radiated power or antenna height above average terrain in any azimuth from an existing fixed transmitter authorized to the filer; or,

(E) relocate an existing fixed transmitter.

(ii) amend a pending application to:

(A) change a requested channel;

(B) extend the service area of a station on a requested channel to include area that would not have been served by that station as previously proposed in the application;

(C) extend the interfering contours of a station on a requested channel beyond the composite interfering contours of that station as previously proposed in the application;

(D) increase the proposed effective radiated power or antenna height above average terrain in any azimuth of a fixed transmitter;

(E) change the location of a fixed transmitter from that previously proposed in the application; or,

(E) change the technical proposal substantially from that which was coordinated with other users pursuant to § 22.150.

(2) Cellular Radiotelephone. In the Cellular Radiotelephone Service, filings are major if they:

(i) request an authorization that would:

(A) establish for the filer a new cellular geographic service area (CGSA);

(B) expand the CGSA of an existing cellular system to include area outside of the cellular market area.

(ii) amend a pending application by making a substantial change in the technical proposal that would:

(A) change the requested channel block;

(B) modify the CGSA of the proposed cellular system to include area that was not included in the CGSA as previously proposed in the application.

(3) Air-ground Radiotelephone. In the Air-ground Radiotelephone Service, filings are major if they:

(i) request an authorization for a new General Aviation ground station or to relocate an existing General Aviation ground station;

(ii) request the first authorization for a new Commercial Aviation ground station at a location other than those listed in § 22.859;

(iii) request authorization to add a channel to or change a channel of an existing General Aviation ground station; or,

(iv) amend a pending application to change the requested channel or channel block.

(4) Offshore Radiotelephone. In the Offshore Radiotelephone Service, filings are major if they:

(i) request an authorization for a new offshore central or subscriber station;

(ii) request authorization to add a channel to or change a channel of an existing offshore central or subscriber station; or,

(iii) amend a pending application to change the technical proposal substantially from that which was coordinated with other users prior to filing.

(f) Clerical errors. Notwithstanding other provisions of this section, amendments that correct typographical, transcription or similar clerical errors that are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or exacerbate channel usage conflicts are

classified as minor.

§ 22.124 Notification processing.

This section contains rules governing the processing of notifications in the Public Mobile Services.

(a) File numbers. Notifications received by the Commission are assigned file numbers. Assignment of a file number to a notification is for administrative convenience and does not constitute a determination that the notified action has been examined and not rejected by the Commission. Assignment of a file number does not preclude the return of a notification subsequently found to be unacceptable.

(b) Unacceptable notifications. A notification is unacceptable if:

(1) it is unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character;

(2) it notifies of an action that does not comply with one or more of the Commission's rules;

(3) it notifies of an action for which an application for authorization is required;

(4) it is submitted without the required microfiche; or,

(5) it is untimely filed.

(c) Review. After a file number is assigned, each notification is reviewed. The purpose of this review is to identify notifications that are unacceptable (e.g. not signed, missing pages, improper or missing fee payment). Notifications found to be unacceptable are returned to the licensee with a brief statement describing the deficiency. The Commission may also direct the licensee to return the station to compliance with its previous license terms. Acceptable notifications are added to the appropriate station files.

§ 22.125 Application for special temporary authorizations.

In circumstances requiring immediate or temporary use of Public Mobile Services stations, carriers may request special temporary authority (STA) to operate new or modified equipment. Such requests may be submitted as informal applications (see § 22.105) and must contain complete details about the proposed operation and the circumstances that fully justify and necessitate the grant of STA. Such requests should be filed in time to be received by the Commission at least 10 days prior to the date of proposed operation or, where an extension is sought, 10 days prior to the expiration date of the existing STA. A request received less than 10 days prior to the desired date of operation may be given expedited consideration only if compelling reasons are given, in writing, for the delay in submitting the request. Otherwise, such late-filed requests are considered in turn, but action might not be taken prior to the desired date of operation. Requests for STAs must be accompanied by the proper filing fee.

(a) Grant without Public Notice. STAs may be granted without being listed in a Public Notice, or prior to 30 days after such listing, if:

(1) the STA is to be valid for 30 days or less and the applicant does not plan to file an application for regular authorization of the subject operation;

(2) the STA is to be valid for 60 days or less, pending the filing of an application for regular authorization of the subject operation;

(3) the STA is to allow interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) the STA is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(b) Limit on STA term. The Commission may grant STAs valid for a period not to exceed 180 days under the provisions of § 309(f) of the Communications Act of 1934, as amended, (47 U.S.C. 309(f)) if extraordinary circumstances so require, and pending the filing of an application for regular operation. The Commission may grant extensions of STAs for a period of 180 days, but the applicant must show that extraordinary circumstances warrant such an extension.

§ 22.127 Public notices.

Periodically, the Commission issues Public Notices listing major filings and other information of public significance. Categories of Public Notice listings are as follows:

(a) Accepted for filing. Tentative acceptance for filing of applications and major amendments thereto.

(b) Actions. Commission and staff actions on pending applications previously listed as accepted for filing.

(c) Informative listings. Information that the Commission, in its discretion, believes to be of public significance. Such listings do not create any rights to file oppositions or other pleadings.

§ 22.128 Dismissal of applications.

The Commission may dismiss any application for authorization or assignment of authorization in the Public Mobile Services, upon request by the applicant, or for failure to prosecute, or if the application is found to be defective. Such dismissal may be "without prejudice," meaning that the Commission may accept from the applicant another application for the same purpose at any later time, or "with prejudice," meaning that the Commission will not accept from the applicant another application for the same purpose for a period of one year. Unless otherwise provided in this part, a dismissed application will not be returned to the applicant.

(a) Dismissal at request of applicant. Any applicant may request that its application be returned or dismissed. A request for the return of an application after it has been listed on Public Notice as tentatively accepted for filing is considered to be a request for dismissal of that application without prejudice.

(1) Upon receipt of an applicant's request for dismissal of its application with prejudice, the Commission will dismiss that application with prejudice.

(2) Upon receipt of an applicant's request for dismissal of its application without prejudice, the Commission will dismiss that application without prejudice, unless it has been designated for comparative hearing or selected in a random selection process. An applicant's request for dismissal of its application without prejudice after that application has been designated for comparative hearing

or selected in a random selection process will be granted only for good cause shown. In such event, a written petition demonstrating good cause and complying with § 22.129 must be submitted to the Commission and served upon all parties of record.

(b) Dismissal for failure to prosecute. The Commission may dismiss applications for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Such dismissal will generally be without prejudice if the failure to prosecute or respond occurred prior to designation of the application for comparative hearing or prior to selection of the application in the random selection process, but may be with prejudice in cases of non-compliance with § 22.129. Dismissal will generally be with prejudice if the failure to prosecute or respond occurred after designation of the application for comparative hearing or after selection of the application in the random selection process.

(c) Dismissal as defective. The Commission may dismiss without prejudice applications that it finds to be defective. Applications for authorization or assignment of authorization are defective if:

(1) they are unsigned or incomplete with respect to required answers to questions, informational showings, or other matters of a formal character;

(2) they request an authorization that would not comply with one or more of the Commission's rules and do not contain a request for waiver of these rule(s), or in the event that the Commission denies such a waiver request, do not contain an alternative proposal that fully complies with the rules;

(3) state certification for the requested facility has been denied;

(4) they are not selected in a random selection process and the selected application is granted; or,

(5) reasonable efforts have been made to coordinate the proposed facility with foreign administrations under applicable international agreements, and an unfavorable response (harmful interference anticipated) has been received.

(d) Dismissal as untimely. The Commission may dismiss without prejudice applications that are prematurely or late filed, including applications filed prior to the opening date or after the closing date of a filing window.

§ 22.129 Agreements to dismiss applications, amendments or petitions to deny.

Parties that have filed an application in the Public Mobile Services that is mutually exclusive with one or more other applications, and then enter into an agreement to resolve the mutual exclusivity by withdrawing or requesting dismissal of the application or an amendment thereto, must obtain the approval of the Commission. Parties that have filed a petition to deny against a pending application, and then seek to withdraw or request dismissal of the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the Commission.

(a) Applications and petitions to deny. The party withdrawing or requesting dismissal of its application or petition to deny must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of any written agreement related to the withdrawal or dismissal, and an affidavit setting forth:

(1) a certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the withdrawal or dismissal of the application or petition to deny. This paragraph does not apply to bona fide merger agreements;

(2) the exact nature and amount of any consideration received or promised;

(3) an itemized accounting of the expenses for which it seeks reimbursement; and

(4) the terms of any oral agreement related to the withdrawal or dismissal of the application or petition to deny.

(b) In addition, within 5 days of the filing date of the applicant or petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(1) a certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for withdrawing or dismissing the application or petition to deny; and

(2) the terms of any oral agreement relating to the withdrawal or dismissal of the application or petition to deny.

(c) Provisions. For the purposes of this section:

(1) Affidavits filed pursuant to this section must be executed by:

(i) the filing party, if an individual;

(ii) a partner having personal knowledge of the facts, if a partnership; or,

(ii) an officer having personal knowledge of the facts, if a corporation or association.

(2) Applications or petitions to deny are deemed to be pending before the Commission from the time the application or petition to deny is filed with the Commission until such time as an order of the Commission granting or denying the application or petition to deny is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a party in preparing to file, filing, prosecuting and/or settling its application or petition to deny for which reimbursement is sought.

(4) "Other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(5) Reimbursement by an applicant of the legitimate and prudent expenses of a potential petitioner or objector, incurred reasonably and directly in preparing to file a petition to deny, will not be considered to be payment for refraining from filing a petition to deny or an informal objection. Payments made directly to a potential petitioner or objector, or a person related to a potential petitioner or objector, to implement non-financial promises are

prohibited unless specifically approved by the Commission.

§ 22.130 Petitions to deny, responsive pleadings.

Petitions to deny any major filing may be filed within 30 days after the date of the Public Notice listing such filing, by parties able to demonstrate standing to file such petitions. Responsive pleadings to such petitions may be filed in accordance with the provisions of this section.

(a) Content and requirements. Petitions to deny and responsive pleadings must:

(1) clearly identify the pertinent major filing(s);

(2) comply with all applicable requirements of § 1.41 through § 1.52 of this chapter;

(3) contain specific allegations of fact which, except for facts of which official notice may be taken, are supported by affidavit of a person or persons with personal knowledge thereof, and which are sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant or other Commission action regarding the major filing would be prima facie inconsistent with the public interest;

(4) be filed within 30 days after the date of the Public Notice listing the major filing; and,

(5) contain a certificate of service showing that a copy has been mailed to the applicant no later than the date of filing with the Commission.

(b) Expansion. Petitions to deny a major amendment to an application may raise only matters directly related to the major amendment that could not have been raised in connection with the application as originally filed. This paragraph does not apply to petitioners who gain standing because of the major amendment.

(c) Dismissal. The Commission may, by letter, dismiss any petition to deny a major filing if the petition does not comply with the requirements of this section, if the issues raised become moot, or if the petitioner or his/her attorney fails to appear at a settlement conference pursuant to § 22.135. When a petition to deny is dismissed, any related responsive pleadings are also dismissed.

§ 22.131 Mutually exclusive applications.

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under the rules governing the Public Mobile service involved.

(a) Procedures. Procedures for disposing of mutually exclusive applications are prescribed in the subparts of this part governing the individual Public Mobile services.

(b) Separate applications. Applicants that file an application, knowing that it will be mutually exclusive with one or more previously filed applications, should not include in the mutually exclusive application a request for other channels or facilities that would not, by themselves, render the application mutually exclusive with those previously filed applications. Instead, the request for such other channels or facilities should be filed in a separate application.

§ 22.132 Grants of applications.

Applications for authorization may be granted thirty days after the issuance date of a Public Notice listing an application or the latest filed major amendment thereto as acceptable for filing.

(a) Criteria for grants. The Commission grants applications without a hearing if, after examination of the application and consideration of any petitions or other pleadings and of such other matters as it may officially notice, the Commission finds that:

(1) a grant will serve the public interest, convenience, and necessity;

(2) there are no substantial and material questions of fact presented;

(3) the applicant is eligible and qualified under applicable FCC regulations and policies;

(4) the application is acceptable for filing, and complies with the Commission's rules and other applicable requirements;

(5) the application has not been designated for a hearing after being selected in a random selection process;

(6) there are no applications entitled to comparative consideration with the application being granted; and,

(7) operation of the proposed station would not cause interference to any authorized station(s).

(b) Grant of petitioned applications. The Commission may grant, without a hearing, applications against which petitions to deny have been filed. If any petition(s) to deny are pending (i.e. have not been dismissed pursuant to § 22.130(c) or withdrawn by the petitioner) when an application is granted, the Commission issues a Memorandum Opinion and Order denying the petition(s) to deny and stating the reason(s) for the denial.

(c) Partial and conditional grants. The Commission may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type. When the Commission does this, it will inform the applicant of the reasons therefor. Such partial or conditional grants are final unless the Commission revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization.

(d) Designation for hearing. The Commission may designate applications for a hearing, specifying with particularity the matters in issue, if, after consideration of the application, any petitions or other pleadings, and other matters which it may officially notice, the Commission is unable to make one or more of the findings listed in paragraph (a) of this section. The Commission may grant, deny or take other action with respect to applications designated for a hearing.

§ 22.133 Random selection process.

Certain types of mutually exclusive applications are included in a random selection process after which the selected application may

be granted and the other applications dismissed without prejudice. The procedures governing the random selection process are set forth in § 1.821 et seq. of this chapter. No preferences are awarded.

§ 22.135 Settlement conference.

In any contested application proceeding, the Commission, in its discretion, may direct the parties and/or their attorneys to appear before it for a conference.

(a) The purposes of such conference are:

(1) to obtain admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(2) to consider the necessity for or desirability of amendments to the pleadings, or of additional pleadings or evidentiary submissions;

(3) to consider simplification or narrowing of the issues;

(4) to encourage settlement of the matters in controversy by agreement between the parties; and,

(5) to consider other matters that may aid in the resolution of the contested proceeding.

(b) Conferences are scheduled by the Commission at a time and place it may designate, to be conducted in person or by telephone conference call.

(c) The failure of any party or attorney, following reasonable notice, to appear at a scheduled conference will be deemed a failure to prosecute, rendering that party's application or petition defective and subjecting it to dismissal by the Commission pursuant to § 22.128(b) or § 22.130(c).

§ 22.137 Assignment of authorization; transfer of control.

Authorizations in the Public Mobile Services may be assigned by the licensee to another party, voluntarily or involuntarily, directly or indirectly, or by transfer of control of a corporate licensee holding such authorizations, only upon approval by the Commission. The assignee is responsible for ascertaining that the station facilities are and will remain in compliance with the terms and conditions authorization to be assigned.

(a) Application required. The assignor must file an application for approval of assignment or transfer of control (FCC Form 490). In the case of involuntary assignment, such application must be filed within 30 days after the event causing the assignment. The assignee must file a report qualifying it as a common carrier (FCC Form 430) unless an accurate report is already on file with the Commission.

(b) Notification of completion. Assignments must be completed within 60 days of FCC approval. The assignee must notify the Commission by letter of the date of completion of the assignment. If an assignment is not completed within this time, the assignor must so notify the Commission by letter, and the assignee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment. If the assignment is not completed, the authorization(s) revert to the assignor.

(c) Partial assignment of authorization. If the authorization for some, but not all, of the facilities of a Public Mobile Services station is assigned to another party, voluntarily or involuntarily, such action is a partial assignment of authorization.

(1) To request Commission approval of a partial assignment of authorization, the following must be filed in addition to the forms required by paragraph (a) of this section:

(i) The assignor must notify the Commission (FCC Form 489) of the facilities to be deleted from its authorization upon completion of the assignment.

(ii) The assignee must apply for authority (FCC Form 401) to operate a new station including the facilities for which authorization is assigned, or to modify the assignee's existing station to include the facilities for which authorization was assigned.

(2) Partial assignments must be completed within 60 days of FCC approval. If an approved partial assignment is not completed within this time, the assignor must notify the Commission (FCC Form 489), and the assignee must submit the authorization(s) to the Commission for cancellation or request an extension of time to complete the assignment. If the assignment is not completed, the authorization(s) revert to the assignor.

(d) Limitations. The Commission may dismiss or deny applications for assignment of authorization if:

(1) the Commission is unable to make the findings contained in § 22.132(a) with respect to the both parties to the assignment;

(2) the authorization was obtained for the principal purpose of speculation or profitable resale, rather than provision of common carrier telecommunication services to the public; or,

(3) the authorization is for a commercial aviation system in the Air-ground Radiotelephone Service or an unserved area cellular system in the Cellular Radiotelephone Service and the system has not been constructed or operated, or has been operated for less than one year.

(i) Licensees must not enter into agreements (e.g. option agreements or management contracts) to assign authorizations before or during the first year of operation, even if the assignment is to take place after the first year of operation.

(ii) Notwithstanding the introductory text of paragraphs (d) and (d)(3) of this section, the Commission may grant applications for pro forma assignments during the first year of operation.

§ 22.139 Trafficking.

Carriers must not obtain or attempt to obtain authorizations in the Public Mobile services for the principal purpose of speculation or profitable resale, but rather for the provision of common carrier telecommunication services to the public.

(a) Applications for approval of assignment of authorization may be reviewed by the Commission to determine if the circumstances indicate trafficking in Public Mobile services authorizations.

(b) The Commission may require submission of an affirmative, factual showing, supported by affidavit of persons with personal knowledge thereof, to demonstrate that the assignor did not acquire

the authorization for the principal purpose of speculation or profitable resale. This showing may include, for example, a demonstration that the proposed assignment is due to changed circumstances (described in detail) affecting the licensee to the grant of the authorization, or that the proposed assignment is incidental to a sale of other facilities or a merger of interests.

§ 22.142 Commencement of service; notification requirement.

Stations must begin providing service to the public no later than the date of required commencement of service specified on the authorization. If service to the public has not begun by the date of required commencement of service, the authorization terminates, in whole or in part, without action by the Commission, pursuant to § 22.144. Additional requirements for construction of facilities apply to cellular systems (see § 22.946) and commercial aviation air-ground systems (see § 22.873).

(a) Construction period. The period between the date of grant of an authorization and the date of required commencement of service is referred to as the construction period. The normal terms of construction periods are given in the subparts of this part governing each Public Mobile Service.

(b) Notification requirement. Licensees must notify the Commission (FCC Form 489) of commencement of service to the public. The notification must be mailed no later than 15 days after service begins.

(1) The notification must state whether the station was constructed exactly as authorized or with minor changes.

(2) If service to the public has begun using some, but not all, of the authorized transmitters, the notification must show to which specific transmitters it applies. Additional notifications must be filed if and when other transmitters commence providing service to the public. If the licensee no longer intends to construct and/or operate the remaining authorized transmitters, the notification should so state.

(c) Requests for extension. Before the date of required commencement of service, licensees may file an application (FCC Form 401) requesting an extension of the construction period.

(1) The Commission may grant requests for extension of the construction period if the licensee shows that failure to commence providing service to the public is due to causes beyond its control.

(2) The Commission does not grant requests for extension of the construction period if failure to commence providing service to the public is due to delays caused by lack of financing, failure to obtain an antenna site, or failure to order equipment in a timely manner. If the licensee orders equipment within 90 days of the authorization grant, a presumption of diligence is created.

(3) The Commission does not grant requests for extension of the construction period if state certification has been denied and all state appeals have been exhausted or if there is lack of diligence on the part of the applicant in pursuing state certification. If the licensee files for state certification within 90 days of the authorization grant, a presumption of diligence is created.

(4) The Commission does not grant requests for extension of the construction period if the licensee fails to commence providing service to the public because it intends to assign the authorization. The Commission does not grant requests for extension of the construction period solely to allow an assignee to complete facilities the assignor failed to construct.

(d) Automatic extension for relocation. If, prior to the end of the construction period, a licensee files an application to relocate a transmitter because of loss of site or other involuntary reasons due to causes beyond the licensee's control, the construction period is automatically extended pending disposition of that application. Extension of the construction period for one transmitter under this paragraph does not extend the construction period for other transmitters under the same authorization that are not to be relocated. The filing of applications for modifications other than relocation does not automatically extend the construction period.

§ 22.143 Construction prior to grant of application.

Applicants may construct facilities in the Public Mobile services prior to grant of their applications, subject to the provisions of this section, but must not operate such facilities until the Commission issues an authorization.

(a) General. Applicants may begin construction 90 days after the date of the Public Notice listing the application as tentatively acceptable for filing.

(b) Paging and Radiotelephone Service. For applications to expand the service area of an authorized station in the Paging and Radiotelephone Service by less than 2 kilometers (1 mile) in any direction, the applicant may begin construction after mailing the application to the Commission.

(c) Initial cellular systems. Tentative selectees seeking authorization to operate the first cellular system on a channel block in a cellular market may begin construction 60 days after the date of the Public Notice listing the tentative selectee.

(e) Notification to stop. If the Commission for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(f) Assumption of risk. Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) applications that are not granted;

(2) errors or time lags in Public Notices;

(3) having to alter, relocate or dismantle the facility; or

(4) incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or Commission rules and orders.

(g) Conditions. Except as indicated, all pre-grant construction is subject to the following conditions:

(1) except as provided in paragraph (c) of this section, the application is not mutually exclusive with any other application;

(2) no petitions to deny the application have been filed;

(3) the application does not request a waiver of Commission rules;

(4) the applicant, if necessary, has filed a Notice of Proposed Construction with the FAA and has received from the Commission any required antenna structure marking and lighting specifications;

(5) the applicant has determined that the proposed facility will not have a significant environmental effect in accordance with § 1.1301 et. seq.

(6) if not a cellular facility, the proposed facility will not be located between line A and the U.S.-Canada border;

(7) if cellular facilities, proposed service area boundaries do not extend into Mexico.

(8) if the facility will transmit in the 931-932 MHz frequency range, it is not located in any of the following areas:

(i) between line A or line C and the U.S.-Canada border

(ii) within 161 kilometers (100 miles) of the protected Canadian microwave receiver coordinates listed below; or within 402 kilometers (250 miles) of the Canadian border and within ±30 degrees of the given azimuth from the protected Canadian microwave receiver coordinates listed in Table B-2.

§ 22.144 Termination of authorizations.

Authorizations in the Public Mobile Services remain valid until terminated in accordance with this section, except that the Commission may revoke an authorization pursuant to § 312 of the Communications Act of 1934, as amended (47 U.S.C. 312).

(a) Expiration. Authorizations automatically terminate, without specific Commission action, on the expiration date specified therein, unless a timely application for renewal is filed (see § 22.145).

(b) Failure to commence providing service to the public. Authorizations automatically terminate, in whole or in part, without specific Commission action, on the date of required commencement of service, if service to the public is not commenced by that date (see § 22.142).

(c) Service discontinued. Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued as provided in § 22.317.

(d) STAs. Special Temporary Authorizations automatically terminate, without specific Commission action, at the end of the period specified therein or upon failure to comply with the terms and conditions therein.

(e) Cancellation. By giving Public Notice of such action, the Commission terminates authorizations submitted by licensees for cancellation.

§ 22.145 Renewal application procedures.

Applications for renewal (FCC Form 405) of expiring authorizations must be filed by the licensee prior to, but no earlier than 30 days before, the expiration date of the authorization. A separate application is required for each authorization (call sign). Competing applications from parties wishing to challenge the renewal must be filed during the same 30 day period. Additional renewal requirements applicable only to specific Public Mobile Services are set forth in the subparts governing those services.

Table B-2 - Protected Canadian Terrestrial Microwave Receivers

N. Latitude	W. Longitude	Azimuth from True North
63°35'40"	140°55'36"	173.2°
61°15'13"	138°48'12"	312.2°
49°33'50"	90°21'15"	205.5°
49°07'07"	93°55'30"	265.4°
48°48'17"	123°17'06"	255.4°
48°58'18"	88°18'24"	221.7°
48°45'36"	92°37'03"	259.5°
48°19'11"	84°04'12"	192.5°
48°27'56"	81°18'14"	238.6°
47°55'08"	69°23'08"	222.1°
45°16'35"	74°06'06"	75.1°

§ 22.147 Authorization conditions.

Authorizations in the Public Mobile Services are granted subject to the conditions in this section in the indicated circumstances.

(a) Errors or omissions in technical exhibits. When processing applications, the Commission relies upon required technical exhibits demonstrating compliance with the rules in this part. To prevent actual interference resulting from operation of stations authorized in reliance upon technical exhibits that contain errors or omissions, each authorization in the Paging and Radiotelephone Service and the Rural Radiotelephone Service granted after January 1, 1993 has the following condition attached:

> This authorization is subject to the condition that, if actual interference occurs as a result of operation of the facilities authorized herein because of an omission or error in the required technical exhibits of the application that resulted in the grant of this authorization, the Commission may suspend the operation of such facilities, in whole or in part, as necessary to eliminate the interference, without affording the licensee an opportunity for hearing.

(b) Assignment of mobile channel to base or fixed transmitter. Each authorization that assigns to a base or fixed transmitter channel(s) that are designated in § 22.561 of this part for assignment to mobile transmitters has the following condition attached:

> This authorization is subject to the condition that, if actual interference occurs as a result of operation of base or fixed facilities authorized herein to transmit on channel(s) designated in § 22.561 of the Commission's rules for assignment to mobile transmitters, the Commission may suspend the operation of such base or fixed facilities, in whole or in part, as necessary to eliminate the interference, without affording the licensee an opportunity for a hearing.

§ 22.150 Standard pre-filing technical coordination procedure.

For operations on certain channels in the Public Mobile Services, carriers must attempt to coordinate the proposed use of spectrum with other affected spectrum users prior to filing an application for authority to operate a station. Rules requiring this procedure for specific channels and types of stations are contained in the subparts governing the individual Public Mobile Services.

(a) Coordination comprises two steps - notification and response. Each step may be accomplished orally or in writing.

(b) Notification must include relevant technical details of the proposal. At minimum, this should include the following:

(1) Geographical coordinates of the antenna site(s).

(2) Transmitting and receiving channels to be added or changed.

(3) Transmitting power, emission type and polarization.

(4) Transmitting antenna pattern and maximum gain.

(5) Transmitting antenna height above ground level.

(c) Applicants and licensees receiving notification must respond promptly, even if no channel usage conflicts are anticipated. If any notified party fails to respond within 30 days, the applicant may file the application without a response from that party.

(d) The 30-day period begins on the date of receipt of the notification by the party being notified. If the notification is by mail, this date may be ascertained by:

(1) the return receipt on certified mail,

(2) the enclosure of a card to be dated and returned by the party being notified, or

(3) a conservative estimate of the time required for the mail to reach its destination. In this case, the date when the 30-day period will expire must be stated in the notification.

(e) All channel usage conflicts discovered during the coordination process should be resolved prior to filing of the application. However, if the applicant is unable or unwilling to resolve a particular conflict, the application may be accepted for filing if it contains a statement describing the unresolved conflict and a brief explanation of the reasons why a resolution was not achieved.

(f) If a number of changes in the technical parameters of a proposed facility become necessary during the course of the coordination process, an attempt should be made to minimize the number of separate notifications. If the changes are incorporated into a completely revised notice, the items that were changed from the previous notice should be identified.

(g) In situations where subsequent changes are not numerous or complex, the party receiving the changed notification should make an effort to respond in less than 30 days. If the applicant believes a shorter response time is reasonable and appropriate, it should so indicate in the notice and suggest a response date.

(h) In situations where a change in the technical parameters could not affect the facilities of one or more parties that received an initial notification, it is not required to coordinate that change with these parties. However, these parties must be advised of the change and of the opinion that coordination is not required.

§ 22.157 Distance computation.

The method given in this section must be used to compute the distance between any two locations, except that, for computation of distance involving stations in Canada and Mexico, methods for distance computation specified in the applicable international agreement, if any, must be used instead. The method set forth in this paragraph is valid only for distances not exceeding 475 km (295 miles).

(a) Convert the latitudes and longitudes of each reference point from degree-minute-second format to degree-decimal format by dividing minutes by 60 and seconds by 3600, then adding the results to degrees.

$$LATX_{dd} = DD + \frac{MM}{60} + \frac{SS}{3600}$$

$$LONX_{dd} = DDD + \frac{MM}{60} + \frac{SS}{3600}$$

(b) Calculate the mean geodetic latitude between the two reference points by averaging the two latitudes:

$$ML = \frac{LAT1_{dd} + LAT2_{dd}}{2}$$

(c) Calculate the number of kilometers per degree latitude difference for the mean geodetic latitude calculated in paragraph (b) as follows:

$$KPD_{lat} = 111.13209 - 0.56605 \cos 2ML + 0.00120 \cos 4ML$$

(d) Calculate the number of kilometers per degree of longitude difference for the mean geodetic latitude calculated in paragraph (b) as follows:

$$KPD_{lon} = 111.41513 \cos ML - 0.09455 \cos 3ML + 0.00012 \cos 5ML$$

(e) Calculate the North-South distance in kilometers as follows:

$$NS = KPD_{lat} \times (LAT1_{dd} - LAT2_{dd})$$

(f) Calculate the East-West distance in kilometers as follows:

$$EW = KPD_{lon} \times (LON1_{dd} - LON2_{dd})$$

(g) Calculate the distance between the two locations by taking the square root of the sum of the squares of the East-West and North-South distances:

$$DIST = \sqrt{NS^2 + EW^2}$$

(h) Terms used in this section are defined as follows:

(1) $LAT1_{dd}$ and $LON1_{dd}$ are the coordinates of the first location in degree-decimal format.

(2) $LAT2_{dd}$ and $LON2_{dd}$ are the coordinates of the second location in degree-decimal format.

(3) ML is the mean geodetic latitude in degree-decimal format.

(4) KPD_{lat} is the number of kilometers per degree of latitude at a given mean geodetic latitude.

(5) KPD_{lon} is the number of kilometers per degree of longitude at a given mean geodetic latitude.

(6) NS is the North-South distance in kilometers.

(7) DIST is the distance between the two locations, in kilometers.

§ 22.159 Computation of average terrain elevation.

Average terrain elevation must be calculated by computer using elevations from a 30 second point or better topographic data file. The file must be identified. If a 30 second point data file is used, the elevation data must be processed for intermediate points using interpolation techniques; otherwise, the nearest point may be used. In cases of dispute, average terrain elevation determinations can also be done manually, if the results differ significantly from the computer derived averages.

(a) Radial average terrain elevation is calculated as the average of the elevation along a straight line path from 3 to 16 kilometers (2 and 10 miles) extending radially from the antenna site. If a portion of the radial path extends over foreign territory or water, such portion must not be included in the computation of average elevation unless the radial path again passes over United States land between 16 and 134 kilometers (10 and 83 miles) away from the station. At least 50 evenly spaced data points for each radial should be used in the computation.

(b) Average terrain elevation is the average of the eight radial average terrain elevations (for the eight cardinal radials).

(c) In Dade and Broward Counties, Florida, average terrain elevation is assumed to be 3 meters (10 feet).

§ 22.161 Application requirements for ASSB.

Applications for base stations employing amplitude companded single sideband modulation (ASSB) must contain the following information:

(a) The application must describe fully the modulation characteristics, emission and occupied bandwidth, and specify the center frequency of the emission for each channel, carrier frequency, and pilot channels, if any. The emission must fall completely within a channel assignable for two-way operation in the Paging and Radiotelephone Service, Rural Radiotelephone Service or Offshore Radiotelephone Service.

(b) The application must contain interference studies between stations within an authorized bandwidth, whether FM-to-ASSB, ASSB-to-FM, or ASSB-to-ASSB in accordance with the following: For ASSB stations, the transmitter nearest to the protected station must be used. The effective radiated power in the direction of the protected station must be the sum of the peak effective radiated power of all transmitters in the group, in the direction of the protected station. The antenna center of radiation height above average terrain must be the highest antenna center of radiation height of any transmitter in the group in the direction of the protected station. The channel of the group is assumed to be the same as that of the protected station (co-channel), and studies must be made in accordance with § 22.567.

§ 22.163 Minor modifications to existing stations.

Licensees may make modifications to existing stations without obtaining prior Commission approval, provided:

(a) Classification as minor. The modifications must be minor. Modifications to a station are minor if an application filed solely for the purpose of obtaining authorization for such modifications would be classified as minor in accordance with § 22.123.

(b) Locations near Canadian border. The facilities to be modified must not be located between Line A or Line C and the US-Canada border.

(c) Antenna structure clearance required. For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, licensees must notify the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1) and file a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, FOB, Antenna Survey Branch, Washington, DC 20554.

(d) Provision of information upon request. Licensees must supply administrative or technical information concerning the

modified facilities upon request by the Commission.

§ 22.165 Additional transmitters for existing systems.

Licensees may operate additional transmitters at additional locations on the same channel or channel block as an existing system without obtaining prior Commission approval, provided:

(a) Locations near Canadian border. The additional transmitters must not be located between Line A or Line C and the US-Canada border.

(b) Antenna structure clearance required. For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, licensees must notify the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1) and file a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, FOB, Antenna Survey Branch, Washington, DC 20554.

(c) Environmental. The additional transmitters must not have a significant environmental effect, as defined by § 1.1301 et seq of this chapter.

(d) Paging and Radiotelephone Service. The provisions in this paragraph apply for stations in the Paging and Radiotelephone Service.

(1) The service area and interfering contours of the additional transmitter(s) must be totally encompassed by the composite service area contour and predicted interfering contour, respectively, of the existing station on the same channel; except that this limitation does not apply to nationwide network paging stations or in-building radiation systems.

(2) Additional transmitters in the 43 MHz frequency range operate under developmental authority, subject to the conditions set forth § 22.411 of this part.

(3) The additional transmitters must not operate on control channels in the 470-512 MHz, 928 MHz, 932 MHz, 941 MHz and 959 MHz frequency ranges.

(e) Cellular Radiotelephone Service. The service area boundaries of the additional transmitters must remain within the market. After the five year fill-in period, the service area boundaries of the additional transmitters must remain within the CGSA.

(f) Air-ground Radiotelephone Service. Ground stations may be added to Commercial Aviation air-ground systems at previously established ground station locations, pursuant to this section, subject to compliance with the applicable technical rules. This section does not apply to General Aviation air-ground stations.

(g) Rural Radiotelephone Service. A "service area" and "interfering contours" must be determined using the same method as for stations in the Paging and Radiotelephone Service. The service area and interfering contours so determined for the additional transmitter(s) must be totally encompassed by the similarly determined composite service area contour and predicted interfering contour, respectively, of the existing station on the same channel.

(h) Offshore Radiotelephone Service. This section does not apply to stations in the Offshore Radiotelephone Service.

(i) Provision of information upon request. Upon request by the Commission, licensees must supply administrative or technical information concerning the additional transmitters.

§ 22.167 Applications for assigned but unused channels.

It is the policy of the Commission to encourage effective use of the spectrum by facilitating the expeditious reassignment of Public Mobile Service channels that have been assigned but are not currently being used to provide service to the public. This section sets forth procedures whereby carriers may apply for such assigned but unused channels prior to the deletion of their previous assignment from Commission station files.

(a) Finder's applications. Whenever a regular authorization automatically terminates in whole or in part without specific Commission action pursuant to paragraphs (b) or (c) of § 22.144, carriers may file applications that do not meet the technical criteria for protection of the specific facilities for which the authorization has terminated. Such applications are referred to as finder's applications. Finder's applications must comply with all applicable rules in this part, except as pertains to protection of the facilities for which authorization has terminated without specific Commission action.

(b) Requirements. Finder's applications serve to make the Commission aware of authorizations that have terminated without specific Commission action, so that these authorizations may be removed from the Commission's station files. Accordingly, finder's applications must indicate that they are finder's applications and must identify the specific facilities (by call sign, channel and location) for which authorization has terminated without specific Commission action. Finder's applications must also include a statement providing complete details of the discontinuance of service or failure to commence providing service to the public by these facilities.

(c) Procedures. The Commission identifies finder's applications as such on the Public Notice listing them as tentatively acceptable for filing. The Commission may also conduct an investigation to verify that the authorization for the identified facilities has terminated.

Subpart C - Operational and Technical Requirements

OPERATIONAL REQUIREMENTS

§ 22.301 Station inspection.

The licensee of any station authorized in the Public Mobile Services must make the station and station records available for inspection by representatives of the Commission at any reasonable hour.

§ 22.303 Posting station authorizations.

The current authorization for each station must be retained as a permanent part of the station records. A clearly legible photocopy of the authorization must be available at each regularly attended control point of the station. The station call sign must be clearly and legibly marked on every transmitter, other than mobile transmitters, of the station.

§ 22.305 Operator and maintenance requirements.

FCC operator permits and licenses are not required to operate, repair or maintain equipment authorized in the Public Mobile Services. Station licensees are responsible for the proper operation and maintenance of their stations, and for compliance with the Commission's rules.

§ 22.307 Operation during emergency.

Licensees of stations in the Public Mobile services may, during a period of emergency in which normal communications facilities are disrupted as a result of hurricane, flood, earthquake, or disaster, use their stations to temporarily provide emergency communications services in a manner or configuration not normally allowed by this part, provided that such operations comply with the provisions of this section.

(a) Technical limitations. Public Mobile stations providing temporary emergency communications service must not transmit:

(1) on channels other than those authorized for normal operations;

(2) with power in excess of that authorized for normal operations;

(3) emission types other than those authorized for normal operations.

(b) Discontinuance. Temporary emergency use of Public Mobile stations must be discontinued as soon as normal communication facilities are restored. The Commission may, at any time, order the discontinuance of any such emergency communication services.

§ 22.313 Station identification.

The licensee of each station in the Public Mobile Services must ensure that the transmissions of that station are identified in accordance with the requirements of this section.

(a) Station identification is not required for transmissions by:

(1) stations in the Cellular Radiotelephone Service;

(2) general aviation ground stations in the Air-ground Radiotelephone Service;

(3) rural subscriber stations using meteor burst propagation mode communications in the Rural Radiotelephone Service.

(b) For all other stations in the Public Mobile Services, station identification must be transmitted at the end of each transmission or series of transmissions. During prolonged or continuous series of transmissions, station identification must be transmitted at periodic intervals not to exceed thirty minutes; however, transmission of such periodic station identification may be temporarily delayed to avoid interrupting the continuity of any public communication in progress, provided that station identification is transmitted at the conclusion of that public communication.

(c) Station identification must be transmitted by telephony using the English language or by telegraphy using the international Morse code, and in a form that can be received using equipment appropriate for the modulation type employed, and understood without the use of unscrambling devices. Station identification comprises transmission of the call sign assigned by the Commission to the station, however, the following may be used in lieu of the call sign:

(1) for transmissions from subscriber operated transmitters, the telephone number or other designation assigned by the carrier, provided that a written record of such designations is maintained by the carrier;

(2) for general aviation airborne mobile stations in the Air-ground Radiotelephone Service, the official FAA registration number of the aircraft;

(3) for stations in the Paging and Radiotelephone Service, a call sign assigned to another station within the same system.

§ 22.315 Duty to respond to official communications.

Licensees in the Public Mobile services must respond to official communications from the Commission with reasonable dispatch and according to the tenor of the communication. Failure to do so may be considered by the Commission to reflect adversely on a carrier's qualifications to hold FCC authorizations, and may also create liabilities for other sanctions.

(a) Any person receiving official notice of an apparent or actual violation of a federal statute, international agreement, Executive Order, or regulation pertaining to communications shall respond in writing within 10 days to the office of the Commission originating the notice. If a response can not be sent within 10 days, an acknowledgement shall be sent, followed by a response as soon as possible explaining the reason for the delay.

(b) Responses to official communications must be complete and self-contained without reference to other communications unless copies of such other communications are attached to the response.

§ 22.317 Discontinuance of station operation.

If the operation of a Public Mobile Services station is permanently discontinued, the licensee shall send the authorization for cancellation to: Mobile Services Division, Common Carrier Bureau, Federal Communications Commission, Washington DC 20554. For purposes of this section, any station that has not provided service to the public for 90 continuous days is considered to have been permanently discontinued, unless the applicant notified the Commission otherwise prior to the end of the 90 day period and provided a date on which operation will resume, which date must not be in excess of 30 additional days.

§ 22.321 Equal employment opportunities.

Common carrier licensees shall afford equal opportunity in employment to all qualified persons, and personnel must not be discriminated against in employment because of sex, race, color, religion, or national origin.

(a) Equal employment opportunity program. Each licensee shall establish, maintain, and carry out a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice.

(1) Under the terms of its program, a licensee shall:

(i) Define the responsibility of each level of management to

insure a positive application and vigorous enforcement of the policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance.

(ii) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

(iii) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to sex, race, color, religion or national origin, and solicit their recruitment assistance on a continuing basis.

(iv) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon sex, race, color, religion, or national origin, from the licensee's personnel policies and practices and working conditions.

(v) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

(2) The program must reasonably address specific concerns through policies and actions as set forth in this paragraph, to the extent that they are appropriate in consideration of licensee size, location and other factors.

(i) To assure nondiscrimination in recruiting.

(A) Posting notices in the licensee's offices informing applicants for employment of their equal employment rights and their right to notify the Equal Employment Opportunity Commission, the Federal Communications Commission, or other appropriate agency. Where a substantial number of applicants are Spanish-surnamed Americans, such notice should be posted in both Spanish and English.

(B) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of sex, race, color, religion or national origin is prohibited, and that they may notify the Equal Employment Opportunity Commission, the Federal Communications Commission or other appropriate agency if they believe they have been discriminated against.

(C) Placing employment advertisements in media which have significant circulation among minority groups in the recruiting area.

(D) Recruiting through schools and colleges with significant minority group enrollments.

(E) Maintaining systematic contacts with minority and human relations organizations, leaders and spokespersons to encourage referral of qualified minority or female applicants.

(F) Encouraging present employees to refer minority or female applicants.

(G) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members are being sought for consideration whenever the licensee hires.

(ii) To assure nondiscrimination in selection and hiring.

(A) Instructing personally those on the staff of the licensee who make hiring decisions that all applicants for all jobs are to be considered without discrimination.

(B) Where union agreements exist, cooperating with the union or unions in the development of programs to assure qualified minority persons or females of equal opportunity for employment, and including an effective nondiscrimination clause in new or renegotiated union agreements.

(C) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iii) To assure nondiscriminatory placement and promotion.

(A) Instructing personally those of the licensee's staff who make decisions on placement and promotion that minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination.

(B) Giving minority groups and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower-paid employees with respect to any of the higher-paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions.

(C) Reviewing seniority practices to insure that such practices are nondiscriminatory and do not have a discriminatory effect.

(D) Avoiding use of selection techniques or tests that have the effect of discriminating against minority groups or females.

(iv) To assure nondiscrimination in other areas of employment practices.

(A) Examining rates of pay and fringe benefits for present employees with equivalent duties and adjusting any inequities found.

(B) Providing opportunity to perform overtime work on a basis that does not discriminate against qualified minority groups or female employees.

(b) EEO statement. Each licensee having 16 or more full-time employees shall file with the Commission, no later than May 31st following the grant of that licensee's first Public Mobile Services authorization, a statement describing fully its current equal employment opportunity program, indicating specific practices to be followed in order to assure equal employment opportunity on the basis of sex, race, color, religion or national origin in such aspects of employment practices as regards recruitment, selection, training, placement, promotion, pay, working conditions, demotion, layoff and termination. Any licensee having 16 or more full-time employees that changes its existing equal employment opportunity program shall file with the Commission, no later than May 31st thereafter, a revised statement reflecting the change(s).

NOTE: Licensees having 16 or more full-time employees that were granted their first Public Mobile Services authorization prior to [effective date], and do not have a current EEO statement on file with the Commission, must file such statement, required by paragraph (b) of § 22.321, no later than May 31, 1993.

(c) Report of complaints filed against licensees. Licensees shall submit an annual report to the FCC no later than May 31st of each year indicating whether any complaints regarding violations by the licensee or equal employment provisions of Federal, State, Territorial, or local law have been filed before anybody having competent jurisdiction.

(1) The report should state the parties involved, the date filing, the courts or agencies before which the matters have been heard, the appropriate file number (if any), and the respective disposition or current status of any such complaints.

(2) Any licensee who has filed such information with the EEOC need not do so with the Commission, if such previous filing is indicated.

(d) Complaints of violations of Equal Employment Programs. Complaints alleging employment discrimination against a common carrier licensee are considered by the Commission in the following manner:

(1) If a complaint raising an issue of discrimination is received against a licensee who is within the jurisdiction of the EEOC, it is submitted to that agency. The Commission maintains a liaison with that agency that keeps the Commission informed of the disposition of complaints filed against common carrier licensees.

(2) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC but is covered by appropriate enforceable State law, to which penalties apply, may be submitted by the Commission to the respective State agency.

(3) Complaints alleging employment discrimination against a common carrier licensee who does not fall under the jurisdiction of the EEOC or an appropriate State law, are accorded appropriate treatment by the FCC.

(4) The Commission will consult with the EEOC on all matters relating to the evaluation and determination of compliance by the common carrier licensees with the principles of equal employment as set forth herein.

(5) Complaints indicating a general pattern of disregard of equal employment practices which are received against a licensee that is required to file an employment report to the Commission under § 1.815(a) of this chapter are investigated by the Commission.

(e) Commission records. A copy of every annual employment report, equal employment opportunity program statement, reports on complaints regarding violation of equal employment provisions of Federal, State, Territorial, or local law, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference, are open for public inspection at the offices of the Commission.

(f) Licensee records. Each licensee required to file annual employment reports (pursuant to § 1.815(a) of this chapter), equal employment opportunity program statements, and annual reports on complaints regarding violations of equal employment provisions of Federal, State, Territorial, or local law shall maintain for public inspection a file containing a copy of each such report and copies of all exhibits, letters, and other documents filed as part thereto, all correspondence between the licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference. The documents must be retained for a period of 2 years.

§ 22.323 Incidental communications services.

Carriers authorized to operate stations in the Public Mobile radio services may use these stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued, provided that:

(a) the costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers;

(b) the quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services;

(c) the provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with Commission rules and policies; and

(d) the licensee notifies the Commission by letter before providing the incidental services. This notification must include a complete description of the incidental services.

§ 22.325 Control points.

Each station in the Public Mobile Services must have at least one control point and a person on duty who is in charge of station operation. Each control point must have facilities that allow the person on duty to turn off the transmitters.

TECHNICAL REQUIREMENTS

§ 22.351 Channel assignment policy.

The channels allocated for use in the Public Mobile Services are listed in the applicable subparts of this part. Channels and channel blocks are assigned in such a manner as to facilitate the rendition of service on an interference-free basis in each service area. Except as otherwise provided in this part, each channel or channel block is assigned exclusively to one common carrier in each service area. All applicants for, and licensees of, stations in the Public Mobile Services shall cooperate in the selection and use of channels in order to minimize interference and obtain the most efficient use of the allocated spectrum.

§ 22.352 Protection from interference.

Public Mobile Services stations operating in accordance with the Commission's rules and the terms and conditions of their authorizations are normally considered to be non-interfering. However, if the Commission determines that interference which significantly interrupts or degrades a radio service is being caused, the Commission may require modifications to any Public Mobile station to eliminate such interference.

(a) Failure to operate as authorized. Any licensee causing interference to the service of other stations by failing to operate its station in accordance with its authorization or the Commission's

rules shall discontinue all transmissions, except those concerning the immediate safety of life or property, until it can bring its station into full compliance with the authorization and rules.

(b) Intermodulation interference. Licensees should attempt to resolve such interference by technical means.

(c) Situations in which no protection is afforded. Except as provided elsewhere in this part, no protection from interference is afforded in the following situations:

(1) Interference to base receivers from base transmitters. Licensees should attempt to resolve such interference by technical means or operating arrangements.

(2) Interference to mobile receivers from mobile transmitters. No protection is provided against mobile-to-mobile interference.

(3) Interference to base receivers from mobile transmitters. No protection is provided against mobile-to-base interference.

(4) Interference to fixed stations. Licensees should attempt to resolve such interference by technical means or operating arrangements.

(5) Anomalous or infrequent propagation modes. No protection is provided against interference caused by tropospheric and ionospheric propagation of signals.

§ 22.353 Blanketing interference.

Licensees of Public Mobile services stations are responsible for resolving cases of blanketing interference in accordance with the provisions of this section.

(a) Except as provided in paragraph (c) of this section, licensees must resolve any cases of blanketing interference in their area of responsibility caused by operation of their transmitter(s) during a one-year period following commencement of service from new or modified transmitter(s). Interference must be resolved promptly at no cost to the complainant.

(b) The area of responsibility is that area in the immediate vicinity of the transmitting antenna of stations where the field strength of the electromagnetic radiation from such stations equals or exceeds 115 dBμV/m. To determine the radial distance to the boundary of this area, the following formula must be used:

$$d = 0.394 \times \sqrt{p}$$

where d is the radial distance to the boundary, in kilometers
p is the radial effective radiated power, in kilowatts

The maximum effective radiated power in the pertinent direction, without consideration of the antenna's vertical radiation pattern or height, must be used in the formula.

(c) Licensees are not required to resolve blanketing interference to mobile receivers or non-RF devices or blanketing interference occurring as a result of malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers.

(d) Licensees that install transmitting antennas at a location where there are already one or more transmitting antennas are responsible for resolving any new cases of blanketing interference in accordance with this section.

(e) Two or more licensees that concurrently install transmitting antennas at the same location are jointly responsible for resolving blanketing interference cases, unless the Commission can readily determine which station is causing the interference, in which case the licensee of that station is held fully responsible.

(f) After the one year period of responsibility to resolve blanketing interference, licensees must provide upon request technical information to complainants on remedies for blanketing interference.

§ 22.355 Frequency tolerance.

The carrier frequency of each transmitter in the Public Mobile Services must be maintained within the tolerances given in Table C-1.

Table C-1 - Frequency Tolerance for Transmitters in the Public Mobile Services

Frequency range	base, fixed	mobile > 3 Watts	mobile <= 3 Watts
25 to 50 MHz	20.0 ppm	20.0 ppm	50.0 ppm
50 to 450 MHz	5.0 ppm	5.0 ppm	50.0 ppm
450 to 512 MHz	2.5 ppm	5.0 ppm	5.0 ppm
821 to 896 MHz	1.5 ppm	2.5 ppm	2.5 ppm
928 to 929 MHz	5.0 ppm	n/a	n/a
929 to 960 MHz	1.5 ppm	n/a	n/a
2110 to 2220 MHz	10.0 ppm	n/a	n/a

§ 22.357 Emission types.

All authorized stations in the Public Mobile services may transmit the standard emission types set forth in this section, regardless of whether or not they are listed on the station authorization. Before using any emission types other than those set forth in this section (e.g. amplitude compandored single sideband), licensees must apply for and obtain authority to do so, and explain in detail the reason why such authority is needed. An explanation of the standard international emission designators used throughout the Commission's rules is contained in Subpart C of Part 2 of this chapter.

(a) All stations in the Public Mobile Services may transmit unmodulated emissions (N0N) for short periods for equipment testing.

(b) All stations in the Paging and Radiotelephone Service, Rural Radiotelephone Service and Offshore Radiotelephone services may transmit the following:

(1) emission types: 15K0F2D, 16K0F3E, 16K0F3C, 16K0F1D, and 16K0F1E;

(2) emissions resulting from modulation of transmitters by sub-audible tones or other signals used to establish and/or maintain communications;

(3) continuous unmodulated emissions (N0N), with a power at least 10 dB less than that authorized, to prevent false indication of channel occupation.

(c) All stations in the Cellular Radiotelephone Service may transmit the following emission types: 40K0F3E, 40K0F3D and 40K0F1D.

(d) The frequency deviation must not exceed 12 kHz for frequency modulated emissions with a bandwidth of 40 kHz, and 5 kHz for frequency modulated emissions with a bandwidth of 16 kHz.

§ 22.359 Emission masks.

Unless otherwise indicated in the rules governing a specific radio service, all transmitters intended for use in the Public Mobile Services must be designed to comply with the emission masks outlined in this section. If an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

(a) Analog modulation. For transmitters other than those employing digital modulation techniques, the mean or peak envelope power of adjacent channel emissions must be attenuated below the output mean or peak envelope power of the total emission (P, in Watts) in accordance with the following schedule:

(1) On any frequency removed from the center frequency of the assigned channel by more than 50 percent up to and including 100 percent of the authorized bandwidth:

at least 25 dB;

(2) On any frequency removed from the center frequency of the assigned channel by more than 100 percent up to and including 250 percent of the authorized bandwidth:

at least 35 dB;

(3) On any frequency removed from the center frequency of the assigned channel by more than 250 percent of the authorized bandwidth:

at least 43 + 10 log P dB, or 80 dB, whichever is the lesser attenuation.

(b) Digital modulation. For transmitters not equipped with an audio low pass filter and for transmitters employing digital modulation techniques, the mean or peak envelope power of sideband emissions must be attenuated below the mean or peak envelope power of the total emission (P, in Watts) in accordance with the following schedule:

(1) For transmitters that operate in the frequency ranges 35 to 44 MHz, 72 to 73 MHz, 75.4 to 76.0 MHz and 152 to 159 MHz,

(i) On any frequency removed from the center frequency of the assigned channel by a displacement frequency f_d (in kHz) of more than 5 kHz but not more than 10 kHz:

at least 83 log $(f_d \div 5)$ dB;

(ii) On any frequency removed from the center frequency of the assigned channel by a displacement frequency f_d (in kHz) of more than 10 kHz but not more than 250 percent of the authorized bandwidth:

at least 29 log $(f_d^2 \div 11)$ dB or 50 dB, whichever is the lesser attenuation;

(iii) On any frequency removed from the center frequency of the assigned channel by more than 250 percent of the authorized bandwidth:

at least 43 + 10 log P dB, or 80 dB, whichever is the lesser attenuation.

(2) For transmitters that operate in the frequency ranges 450 to 512 MHz and 929 to 932 MHz,

(i) On any frequency removed from the center frequency of the assigned channel by a displacement frequency f_d (in kHz) of more than 5 kHz but not more than 10 kHz:

at least 83 log $(f_d \div 5)$ dB;

(ii) On any frequency removed from the center frequency of the assigned channel by a displacement frequency f_d (in kHz) of more than 10 kHz but not more than 250 percent of the authorized bandwidth:

at least 116 log $(f_d \div 6.1)$ dB, or 50 + 10 log P dB, or 70 dB, whichever is the lesser attenuation;

(iii) On any frequency removed from the center frequency of the assigned channel by more than 250 percent of the authorized bandwidth:

at least 43 + 10 log P dB, or 80 dB, whichever is the lesser attenuation.

(c) Measurement procedure. Either peak or average power may be used, provided that the same technique is used for both the adjacent channel or sideband emissions and the total emission. The resolution bandwidth of the measuring instrument must be set to 300 Hz for measurements on any frequency removed from the center frequency of the assigned channel by no more than 250 percent of the authorized bandwidth and 30 kHz for measurements on any frequency removed from the center frequency of the assigned channel by more than 250 percent of the authorized bandwidth.

§ 22.361 Standby facilities.

Licensees of stations in the Public Mobile Services may install standby transmitters for the purpose of continuing service in the event of failure or other required maintenance of regular transmitters without obtaining separate authorization, provided that operation of the standby transmitters would not increase the service areas or interference potential of the stations, and that such standby transmitters use the same antenna as the regular transmitters they temporarily replace.

§ 22.363 Directional antennas.

Fixed transmitters for point-to-point operation must use a directional transmitting antenna with the major lobe of radiation in the horizontal plane directed toward the receiving antenna or passive reflector of the station for which the transmissions are intended. Directional antennas used in the Public Mobile Services must meet the technical requirements given in Table C-2.

(a) Maximum beamwidth is for the major lobe at the half power points.

(b) Suppression is the minimum attenuation for any secondary lobe referenced to the main lobe.

(c) An omnidirectional antenna may be used for fixed transmitters where there are two or more receive locations at different azimuths.

§ 22.365 Antenna structures; air navigation safety.

Licensees must not allow antenna structures to become a hazard to air navigation.

(a) Marking and lighting. Antenna structures must be marked, lighted and maintained in accordance with Part 17 of this chapter and all applicable rules and requirements of the Federal Aviation Administration. Lighting and marking specifications are contained in FCC Form 715 and FCC Form 715a.

(b) Maintenance contracts. Licensees may enter into a contract with an entity to monitor and carry out necessary maintenance of antenna structures. Licensees that make such contractual arrangements, including situations in which a common antenna structure is used, continue to be responsible for the maintenance of antenna structures in regard to air navigation safety.

§ 22.367 Antenna polarization.

Public mobile station antennas must be of the correct type and properly installed such that the electromagnetic emissions have the polarization required by this section.

(a) Vertical. The following types of stations must radiate a vertically polarized wave:

(1) Base, mobile, dispatch, and auxiliary test stations operating in the Paging and Radiotelephone Service;

(2) Offshore Telephone stations;

(3) Stations transmitting on channels in the 72-76 MHz frequency range;

(4) Stations in the Cellular Radiotelephone Service;

(5) Control and repeater stations transmitting on channels in the 900-960 MHz frequency range;

(6) Rural subscriber stations communicating with base stations in the Paging and Radiotelephone Service;

(7) Ground and airborne mobile stations in the Air-ground Radiotelephone Service.

(b) Horizontal. All Public Mobile Services stations not required or allowed by paragraph (a) of this section to radiate a vertically polarized wave must radiate a horizontally polarized wave.

Table C-2 - Technical Requirements for Directional Antennas

Frequency range	Maximum beamwidth	Suppression
35 to 512 MHz	80°	10 dB
512 to 1500 MHz	20°	13 dB
1500 to 2500 MHz	12°	13 dB

(c) Circular. If communications efficiency would be improved and/or interference reduced, the Commission may authorize stations other than those listed in paragraphs (a)(1) through (a)(7) of this section to radiate a circularly polarized signal.

(d) Any polarization. Public Land Mobile stations transmitting on channels higher than 960 MHz are not limited as to the type of polarization.

§ 22.369 Quiet zones.

Quiet zones are those areas where it is necessary to restrict radiation so as to minimize possible impact on the operations of radio astronomy or other facilities that are highly sensitive to interference. The areas involved and procedures required are as follows:

(a) NRAO, NRRO. The requirements of this paragraph are intended to minimize possible interference at the National Radio Astronomy Observatory site located at Green Bank, Pocahontas County, West Virginia, and at the Naval Radio Research Observatory site at Sugar Grove, Pendleton County, West Virginia.

(1) Carriers planning to construct and operate a new or modified Public Mobile Services station at a permanent fixed location within the area bounded by N.39°15' on the north, W.78°30' on the east, N.37°30' on the south, and W.80°30' on the west must notify the Director, National Radio Astronomy Observatory, Post Office Box No. 2, Green Bank, West Virginia 24944, in writing, of the technical details of the proposed operation. The notification must include the geographical coordinates of the antenna location, the antenna height, antenna directivity (if any), the channel, the emission type and power.

(2) When an application for authority to operate a station is filed with the Commission, the notification required in paragraph (a)(1) of this section should be sent at the same time. The application must state the date that notification in accordance with paragraph (a)(1) of this section was made. After receipt of such applications, the Commission will allow a period of 20 days for comments or objections in response to the notifications indicated.

(3) If an objection to the proposed operation is received during the 20-day period from the National Radio Astronomy Observatory for itself or on behalf of the Naval Radio Research Observatory, the Commission will, after consideration of the record, take whatever action is deemed appropriate.

(b) Table Mountain. The requirements of this paragraph are intended to minimize possible interference at the Table Mountain Radio Receiving Zone of the Research Laboratories of the Department of Commerce located in Boulder County, Colorado.

(1) Carriers planning to construct and operate a new or modified Public Mobile Services station at a permanent fixed location in the vicinity of Boulder County, Colorado are advised to give consideration, prior to filing applications, to the need to protect the Table Mountain Radio Receiving Zone from interference. To prevent degradation of the present ambient radio signal level at the site, the Department of Commerce seeks to ensure that the field strengths of any radiated signals (excluding reflected signals) received on this 1800 acre site (in the vicinity of coordinates 40°07'50" North Latitude, 105°14'40" West Longitude) resulting from new assignments (other than mobile stations) or from the modification or relocation of existing facilities do not exceed the values given in Table C-3.

(1) Advance consultation is recommended, particularly for applicants that have no reliable data to indicate whether the field strength or power flux density figures in the above table would be exceeded by their proposed radio facilities. In general, coordination is recommended for:

(i) Stations located within 2.4 kilometers (1.5 miles);

(ii) Stations located within 4.8 kilometers (3 miles) transmitting with 50 watts or more effective radiated power (ERP) in the primary plane of polarization in the azimuthal direction of the Table Mountain Radio Receiving Zone;

(iii) Stations located within 16 kilometers (10 miles) transmitting with 1 kW or more ERP in the primary plane of polarization in the azimuthal direction of Table Mountain Radio Receiving Zone;

(iv) Stations located within 80 kilometers (50 miles) transmitting with 25 kW or more ERP in the primary plane of polarization in the azimuthal direction of Table Mountain Receiving Zone.

(2) Applicants concerned are urged to communicate with the Radio Frequency Management Coordinator, Department of Commerce, Research Support Services NOAAR/E5X2, Boulder Laboratories, Boulder, CO 80303; telephone (303) 497-6548, in advance of filing their applications with the Commission.

(3) The Commission will not screen applications to determine whether advance consultation has taken place. However, such consultation may avoid the filing of objections from the Department of Commerce or institution of proceedings to modify the authoriza-

Table C-3 - Field Strength Limits for Table Mountain

Frequency range	Field strength	Power flux density
1.6 to 470 MHz	10 mV/m	-65.8 dBW/m^2
470 to 890 MHz	30 mV/m	-56.2 dBW/m^2
890 to 3000 MHz	1 mV/m	-85.8 dBW/m^2

Note: Equivalent values of power flux density are calculated assuming free space characteristic impedance of 376.7 Ω (120π Ω).

tions of stations that radiate signals with a field strength or power flux density at the site in excess of those specified herein.

(c) Federal Communications Commission protected field offices. The requirements of this paragraph are intended to minimize possible interference to FCC monitoring activities.

(1) Carriers planning to construct and operate a new or modified Public Mobile Services station at a permanent fixed location in the vicinity of an FCC protected field office are advised to give consideration, prior to filing applications, to the need to avoid interfering with the monitoring activities of that office. FCC protected field offices are listed in § 0.121 of the Commission's Rules.

(2) Applications for stations (except mobile stations) that could produce on any channel a direct wave fundamental field strength of greater than 10 mV/m (-65.8 dBW/m^2 power flux density assuming a free space characteristic impedance of 120π Ω) in the authorized bandwidth at the protected field office may be examined to determine the potential for interference with monitoring activities. After consideration of the effects of the predicted field strength of the proposed station, including the cumulative effects of the signal from the proposed station with other ambient radio field strength levels at the protected field office, the Commission may add a condition restricting radiation toward the protected field office to the station authorization.

(3) In the event that the calculated field strength exceeds 10 mV/m at the protected field office site, or if there is any question whether field strength levels might exceed that level, advance consultation with the Commission to discuss possible measures to avoid interference to monitoring activities should be considered. Prospective applicants may communicate with: Chief, Field Operations Bureau, Federal Communications Commission, Washington, DC 20554.

(4) Advance consultation is recommended for applicants that have no reliable data to indicate whether the field strength or power flux density figure indicated would be exceeded by their proposed radio facilities. In general, coordination is recommended for:

(i) Stations located within 2.4 kilometers (1.5 miles);

(ii) Stations located within 4.8 kilometers (3 miles) with 50 watts or more average effective radiated power (ERP) in the primary plane of polarization in the azimuthal direction of the protected field offices.

(iii) Stations located within 16 kilometers (10 miles) with 1 kW or more average ERP in the primary plane of polarization in the azimuthal direction of the protected field office;

(iv) Stations located within 80 kilometers (50 miles) with 25 kW or more average ERP in the primary plane of polarization in the azimuthal direction of the protected field office;

(5) Advance coordination for stations transmitting on channels above 1000 MHz is recommended only if the proposed station is in the vicinity of a protected field office designated as a satellite monitoring facility in § 0.121 of this chapter.

(6) The Commission will not screen applications to determine whether advance consultation has taken place. However, such consultation may serve to avoid the need for later modification of the authorizations of stations that interfere with monitoring activities at protected field offices.

§ 22.371 Disturbance of AM broadcast station antenna patterns.

Public Mobile Service licensees that construct or modify towers in the immediate vicinity of AM broadcast stations are responsible for measures necessary to correct disturbance of the AM station antenna pattern which causes operation outside of the radiation parameters specified by the Commission for the AM station, if the disturbance occurred as a result of such construction or modification.

(a) If tower construction or modification is planned within 1 kilometer (0.6 mile) of a non-directional AM broadcast station tower, the Public Mobile Service licensee must notify the licensee of the AM broadcast station in advance of the planned construction or modification. Before and after measurements must be made to determine whether the construction or modification affected the AM station antenna pattern. The Public Mobile Service licensee is responsible for the installation and continued maintenance of any detuning apparatus necessary to restore proper non-directional performance of the AM station tower.

(b) If tower construction or modification is planned within 3 kilometers (1.9 miles) of a directional AM broadcast station array, the Public Mobile Service licensee must notify the licensee of the AM broadcast station in advance of the planned construction or modification. A partial proof of performance must be made before and after the construction or modification to determine whether the AM station antenna pattern was affected. The Public Mobile Service licensee is responsible for the installation and continued maintenance of any detuning apparatus necessary to restore proper performance of the AM station array.

§ 22.373 Access to transmitters.

Unless otherwise provided in this part, transmitters in the Public Mobile Services must meet the requirements of this section.

(a) Transmitters must be installed such that unauthorized persons will not have access to the transmitter or its control point(s).

(b) Transmitters must be designed and installed such that any adjustments or controls that could cause the transmitter to deviate from its authorized operating parameters are accessible only by properly qualified service persons.

(c) Transmitters (other than hand-carried or pack-carried mobile transmitters) and control points must be equipped with a means of indicating when the control circuitry has been put in a condition that should cause the transmitter to radiate.

(d) Transmitters must be designed such that they can be turned off independently of any remote control circuits.

§ 22.375 Use of transmitters in other services prohibited.

Base and fixed transmitters licensed in the Public Mobile services must not be used in any radio service other than a Public Mobile service.

§ 22.377 Type-acceptance of transmitters.

Except as provided in paragraph (b) of this section, transmitters used in the Public Mobile services must be type-accepted for use in

the services regulated under this part. Transmitters must be type-accepted when the station is ready for service, not necessarily at the time of filing an application.

(a) The Commission may list as type-accepted only transmitters that are capable of meeting all technical requirements of the rules governing the service in which they will operate. The procedure for obtaining type-acceptance is set forth in Part 2 of this chapter.

(b) Transmitters operating under a developmental authorization (see Subpart D) do not have to be type-accepted.

(c) Type-accepted transmitters are listed in the Commission's "Radio Equipment List," which is available for public inspection at the Commission in Washington, DC, and its field offices.

(d) In addition to the technical standards contained in this part, transmitters intended for operation in the Cellular Radiotelephone service must be designed to comply with the technical requirements contained in the Commission's cellular system compatibility specification (see § 22.933).

§ 22.379 Replacement of equipment.

Licensees may replace any equipment in Public Mobile stations without applying for authorization or notifying the Commission, provided that:

(a) if a transmitter is replaced, the replacement transmitter must be type-accepted for use in the Public Mobile services;

(b) the antenna structure must not become a hazard to air navigation and its height must not be not increased;

(c) the interference potential of the station must not be increased;

(d) the effective radiated power, emission type, antenna radiation pattern and center of radiation height above average terrain are not changed.

§ 22.381 Auxiliary test transmitters.

Auxiliary test transmitters may be used only for testing the performance of fixed receiving equipment located remotely from the control point. Auxiliary test transmitters may transmit only on channels designated for mobile transmitters.

Subpart D - Developmental Authorizations

§ 22.401 Description and purposes of developmental authorizations.

Communications common carriers may apply for, and the Commission may grant, authority to construct and operate one or more transmitters subject to the rules in this subpart and other limitations, waivers and/or conditions that may be prescribed. Authorizations granted on this basis are developmental authorizations. In general, the Commission grants developmental authorizations in situations and circumstances where it cannot reasonably be determined in advance whether a particular transmitter can be operated or a particular service can be provided without causing interference to the service of existing stations. For example, the Commission may grant developmental authorizations for:

(a) field strength surveys to evaluate the technical suitability of antenna locations for stations in the Public Mobile Services;

(b) experimentation leading to the potential development of a new Public Mobile Service or technology; or,

(c) stations transmitting on channels in certain frequency ranges, to provide a trial period during which it can be individually determined whether such stations can operate without causing excessive interference to existing services.

§ 22.403 General limitations.

The provisions and requirements of this section are applicable to all developmental authorizations.

(a) Developmental authorizations are subject to cancellation at any time upon notice to the licensee, without a hearing being held by the Commission.

(b) Developmental authorizations will normally terminate one year from the date of grant. The Commission may, however, specify a different term.

(c) Stations operating under developmental authorizations must not interfere with the services of regularly authorized stations.

(d) A grant of a developmental authorization does not carry with it any assurance that the Commission will grant an application for regular authorization to operate the same transmitter(s), even if operation during the developmental period has not caused interference and/or the developmental program is successful.

§ 22.409 Developmental authorization for a new public mobile service or technology.

The Commission may grant applications for developmental authority to operate a transmitter for the purpose of developing a new public mobile service or technology not regularly authorized under this part, subject to the requirements of this section. Such applications may request the use of any portion of the spectrum allocated for Public Mobile Service in the Table of Frequency Allocations contained in Part 2 of this chapter, regardless of whether that spectrum is regularly available under this part. Requests to use any portion of the spectrum for a service or purpose other than that indicated in the Table of Frequency Allocations in Part 2 of this chapter may be made only in accordance with the provisions of Part 5 of this chapter.

(a) Preliminary determination. The Commission will make a preliminary determination with respect to the factors set forth in paragraphs (a)(1) through (a)(3) of this section before acting on an application for developmental authority pursuant to this section. These factors are:

(1) that the public interest, convenience or necessity warrants consideration of the establishment of the proposed public mobile service;

(2) that the proposal appears to have potential value to the public that could warrant the establishment of the new service;

(3) that some operational data should be developed for consideration in any rule making proceeding which may be initiated to establish such service.

(b) Petition required. Applications for developmental authorizations pursuant to this section must be accompanied by a petition for rule making requesting the Commission to amend the rules as may be necessary to provide for the establishment of the proposed public mobile service.

(c) Application requirements. Authorizations for developmental authority pursuant to this section will be issued only upon a showing that the applicant has a definite program of research and development which has reasonable promise of substantial contribution to the services authorized by this part. The application must contain an exhibit demonstrating the applicant's technical qualifications to conduct the research and development program, including a description of the nature and extent of engineering facilities that the applicant has available for such purpose. Additionally, the Commission may, in its discretion, require a showing of financial qualification.

(d) Communication service for hire prohibited. Stations authorized under developmental authorizations granted pursuant to this section must not be used to provide communication service for hire, unless otherwise specifically authorized by the Commission.

(e) Adherence to program. Carriers granted developmental authorization pursuant to this section must substantially adhere to the program of research and development described in their application for developmental authorization, unless the Commission directs otherwise.

(f) Report requirements. Upon completion of the program of research and development, or upon the expiration of the developmental authorization under which such program was permitted, or at such times during the term of the station authorization as the Commission may deem necessary to evaluate the progress of the developmental program, the licensee shall submit a comprehensive report, containing:

(1) a description of the progress of the program and a detailed analysis of any result obtained;

(2) copies of any publications produced by the program;

(3) a listing of any patents applied for, including copies of any patents issued;

(4) copies of any marketing surveys or other measures of potential public demand for the new service;

(5) a description of the carrier's experiences with operational aspects of the program including -

(i) the duration of transmissions on each channel or frequency range and the technical parameters of such transmissions; and,

(ii) any interference complaints received as a result of operation and how these complaints were investigated and resolved.

(g) Confidentiality. Normally, applications and developmental reports are a part of the Commission's public records. However, an applicant or licensee may request that the Commission withhold from the public specific exhibits, reports and other material associated with a developmental authorization.

(h) Renewal. Expiring developmental authorizations issued pursuant to this section may be renewed if the carrier -

(1) shows that further progress in the program of research and development requires additional time to operate under developmental authorization;

(2) complied with the reporting requirements of paragraph (e) of this section; and,

(3) immediately resolved to the Commission's satisfaction all complaints of interference caused by the station operating under developmental authority.

§ 22.411 Developmental authorization of 43 MHz paging transmitters.

Because of the potential for interference to the intermediate frequency stages of receivers in broadcast television sets and video recorders, 43 MHz paging channels are assigned only under developmental authorizations subject to the requirements of this section, except as provided in paragraph (d) of this section.

(a) Carrier responsibility. Carriers so authorized shall operate the 43 MHz paging service under developmental authority for a period of two years. During the two year developmental period, carriers must resolve any broadcast television receiver intermediate frequency interference problems that may occur as a result of operation of the 43 MHz paging transmitter(s). Carriers shall inform subscribers receiving service on the channels assigned under developmental authority during the developmental period that this service could be terminated by the Commission on short notice if such action were to become necessary to eliminate interference. Carriers shall notify the appropriate Commission Field Office, in advance, of the date on which service to the public is to begin.

(b) Periodic surveys. To determine the extent of any interference to broadcast television receivers resulting from operation of 43 MHz paging stations authorized pursuant to this section, carriers shall conduct semi-annual surveys during the first two years of operation. The first such survey is to begin on the date when service to the public commences. For each survey, the carrier shall contact at least 25 television viewers to determine whether they have experienced interference.

(1) The carrier shall contact viewers located throughout the geographic area encompassed by a 3 kilometer (2 mile) radius of the 43 MHz paging transmitter antenna site. The carrier must not attempt to obtain a misleading survey by contacting only viewers less likely to be experiencing interference. For example, the carrier must not contact only the viewers located most distant from the paging transmitter antenna site. Instead, the carrier shall contact viewers located near the paging transmitter antenna site.

(2) The carrier shall not, in subsequent surveys, contact viewers who were contacted in a previous survey; provided that, in the event that all of the viewers within 3 kilometers (2 miles) have been contacted, viewers located near the paging transmitter antenna site shall be contacted again.

(c) Periodic reports. Following each survey, the carrier shall submit to the Commission a written report disclosing and evaluating the extent of any interference. These reports must include:

(1) the number of the report (1 to 4);

(2) the station call sign;

(3) the file number of the application that resulted in the developmental authorization;

(4) an exact description of the transmitter location(s);

(5) the date(s) and time of day when the survey was conducted;

(6) the survey method used (e.g. telephone, on-site, etc.);

(7) the names, addresses and telephone numbers of the viewers contacted;

(8) if interference resulted from operation of the 43 MHz paging station, a summary of how the interference problem was resolved;

(9) the names and telephone numbers of any technical personnel consulted and/or employed to resolve interference problems.

(d) Exceptions. The Commission may grant a regular authorization in the Paging and Radiotelephone Service for a 43 MHz paging station in the following circumstances:

(1) After the two-year developmental period, provided that broadcast TV interference complaints have been resolved by the carrier in a satisfactory manner. Licensees that hold a developmental authorization for a 43 MHz paging station and wish to request a regular authorization must file FCC Form 401 prior to the expiration of the developmental period.

(2) In the case of the assignment of or a transfer of control of a regular authorization of a 43 MHz paging station in the Paging and Radiotelephone Service, provided that the station has been in continuous operation providing service with no substantial interruptions.

§ 22.413 Developmental authorization of 72-76 MHz fixed transmitters.

Because of the potential for interference with the reception by broadcast television sets and video recorders of full service TV stations transmitting on TV Channels 4 and 5, 72-76 MHz channels are assigned for use within 16 kilometers (10 miles) of the antenna of any full service TV station transmitting on TV Channel 4 or 5 only under developmental authorizations subject to the requirements of this section, except as provided in paragraph (b) of this section.

(a) Carrier responsibility. Carriers so authorized shall operate the 72-76 MHz fixed station under developmental authority for a period of at least six months. During the developmental period, carriers must resolve any broadcast television receiver interference problems that may occur as a result of operation of the 72-76 MHz transmitter(s).

(b) Exceptions. The Commission may grant a regular authorization in the Paging and Radiotelephone Service for a 72-76 MHz fixed station under the following circumstances:

(1) After six months of operation under developmental authorization, and provided that broadcast TV interference complaints have been resolved by the carrier in a satisfactory manner, the Commission may grant a regular authorization. Licensees that hold a developmental authorization for a 72-76 MHz fixed station and wish to request a regular authorization must file FCC Form 401 prior to the expiration of the developmental authorization.

(2) In the case of the assignment of or a transfer of control of a regular authorization of a 72-76 MHz fixed station in the Paging and Radiotelephone Service, the Commission may grant such assignment or consent to such transfer of control provided that the station has been in continuous operation providing service with no substantial interruptions.

(3) If a proposed 72-76 MHz fixed transmitter antenna is to be located within 50 meters (164 feet) of the antenna of the full service TV station transmitting on TV Channel 4 or 5, the Commission may grant a regular authorization instead of a developmental authorization.

§ 22.415 Developmental authorization of 928-960 MHz fixed transmitters.

Channels in the 928-929 MHz and 952-960 MHz ranges may be assigned under developmental authorizations to fixed transmitters in point-to-multipoint systems at locations that are short-spaced (i.e. do not meet the 113 kilometer (70 mile) separation requirement of § 22.625), subject to the requirements of this section.

(a) Carrier responsibility. Applications for developmental authorizations pursuant to this section must contain an engineering analysis that shows that no interference will be caused or received. Carriers so authorized shall operate the short-spaced transmitter for a period of one year.

(b) Exceptions. The Commission may grant a regular authorization in the Paging and Radiotelephone Service for a short-spaced fixed station under the following circumstances:

(1) After one year of operation under developmental authorization, and provided that no interference has been caused, the Commission may grant a regular authorization. Licensees that hold a developmental authorization and wish to request a regular authorization must file FCC Form 401 prior to the expiration of the developmental authorization.

(2) In the case of the assignment of or a transfer of control of a regular authorization of a short-spaced fixed station in the Paging and Radiotelephone Service, the Commission may grant such assignment or consent to such transfer of control provided that the station has been in continuous operation providing service and no interference has been caused.

§ 22.417 Developmental authorization of meteor burst systems.

Because of the potential for interference to other 42-46 MHz operations, central office and rural subscriber stations in Alaska are authorized to use meteor burst propagation modes to provide rural radiotelephone service only under developmental authorizations subject to the requirements of this section, except as provided in paragraph (b) of this section. See also §§ 22.715(c) and 22.719.

(a) Carrier responsibility. Carriers and subscribers so authorized shall operate the station under developmental authority for a period of at least one year.

(b) Exceptions. The Commission may grant a regular authorization in the Rural Radiotelephone Service for a central office or rural subscriber to use meteor burst propagation modes to provide rural radiotelephone service under the following circumstances:

(1) After one year of operation under developmental authoriza-

tion, and provided that no interference has been caused to other operations, the Commission may grant a regular authorization. Licensees that hold a developmental authorization to use meteor burst propagation modes to provide rural radiotelephone service and wish to request a regular authorization must file FCC Form 401 prior to the expiration of the developmental authorization.

(2) In the case of the assignment of or a transfer of control of a regular authorization of a central office or rural subscriber station authorizing the use of meteor burst propagation modes in the Rural Radiotelephone Service, the Commission may grant such assignment or consent to such transfer of control provided that the station has been in operation providing service with no substantial interruptions.

Subpart E - Paging and Radiotelephone Service

§ 22.501 Scope.

The rules in this subpart govern the licensing and operation of public mobile paging and radiotelephone stations. The licensing and operation of these stations are also subject to rules elsewhere in this part that apply generally to the Public Mobile Services. However, in case of conflict, the rules in this subpart govern.

§ 22.507 Number of transmitters per station.

The rules in this section concern the number of transmitters licensed under each station authorization in the Paging and Radiotelephone Service.

(a) Unless otherwise allowed in this subpart, each station must comprise at least one separate and dedicated transmitter, providing service to the public, for each transmitting channel at each location where that channel is assigned for use by that station.

(b) There is no limit to the number of transmitters that a station may comprise. However, transmitters within a station must be operationally related. Furthermore, it may become necessary, in certain cases, for the Commission to break up wide-area systems into two or more stations for administrative convenience. Except for nationwide paging and other operationally related transmitters, transmitters that are widely separated geographically are not licensed under a single authorization. The Commission may consolidate separately authorized stations upon request of the applicant, if appropriate under this section.

§ 22.509 Procedure for mutually exclusive applications.

Mutually exclusive applications in the Paging and Radiotelephone Service and the Rural Radiotelephone Service are processed in accordance with the rules in this section.

(a) First-filed. Except as provided in paragraphs (b) and (d), when mutually exclusive applications are pending, the earliest-filed (according to filing date) may be granted and the other application(s) dismissed without prejudice.

(b) Same filing date. Except as provided in paragraph (d) of this section, mutually exclusive applications filed on the same day (according to the filing date) or during a Commission specified filing window are included in a random selection process in which all applications receive an order of selection. After the random selection process, the application selected first may be granted and the application(s) excluded by it dismissed without prejudice. Any applications that are no longer excluded as a result of such dismissal(s) may be granted. Next, the earliest selected of any remaining mutually exclusive applications may be granted and any application(s) excluded by it dismissed without prejudice. As before, any applications that are no longer excluded as a result of dismissal(s) may be granted. This process continues until all the applications have been disposed.

(c) Filing date. For the purposes of this section, the filing date of an application is the date on which that application was received in a condition acceptable for filing or the date on which the most recently filed major amendment to that application was received, whichever is later, excluding major amendments in the following circumstances:

(1) the application has been listed as included in a random selection process and the Commission accepts the amendment pursuant to § 22.122(c);

(2) the amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(3) the amendment as received is defective or otherwise unacceptable for filing.

(d) Renewal. Mutually exclusive applications are designated for a comparative hearing if one application is a timely application for renewal.

§ 22.511 Construction period for the Paging and Radiotelephone Service.

The construction period for stations in the Paging and Radiotelephone Service is one year.

§ 22.513 Channel availability.

When acting on applications in which the applicant is not required to request a specific channel, the Commission may assign any channel in the appropriate frequency range, including any channel that becomes available while the application is pending, prior to a random selection process. However, the Commission does not delay action on pending applications in order to wait for a channel to become available.

§ 22.515 Permissible communications paths.

Mobile stations may communicate only with and through base stations. Base stations may communicate only with mobile stations and receivers on land or surface vessels.

§ 22.529 Application requirements for the Paging and Radiotelephone Service.

In addition to information required by Subparts B and D of this part, applications for authorization to operate a transmitter in the Paging and Radiotelephone Service must contain the applicable supplementary information described in this section.

(a) Administrative information. The following information is required by FCC Form 401, Schedule A.

(1) The number of transmitter sites for which authorization is requested.

(2) In the case of finder's applications, information concerning facilities for which authorization(s) have automatically terminated without Commission action. See § 22.167.

(3) The call sign(s) of other facilities in the same area that are ultimately controlled by the real party in interest to the application.

(b) Technical information. The following information is required by FCC Form 401, Schedule B.

(1) Location description; city; county; state; geographical coordinates correct to ±1 second, site elevation above mean sea level;

(2) Antenna manufacturer and type, antenna height to tip above ground level, the height of the center of radiation of the antenna above the average terrain, the height of the antenna center of radiation above the average elevation of the terrain along each of the 8 cardinal radials, antenna gain in the maximum lobe, one to four azimuthal directions of maximum antenna gain, if any, including the azimuth of the maximum lobe of the antenna, a polar plot of the horizontal gain pattern of the antenna, the electric field polarization of the wave emitted by the antenna when installed as proposed;

(3) The center frequency of each channel requested, the maximum effective radiated power, the effective radiated power in each of the cardinal radial directions, the emission types to be used, including bandwidth, the station classification (e.g. base, fixed, mobile).

ONE-WAY PAGING OPERATION

§ 22.531 Channels for one-way paging operation.

The following channels are allocated for assignment to base transmitters that provide one-way public paging service. Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

Low VHF channels

35.20	35.46	43.20	43.46
35.22	35.50	43.22	43.50
35.24	35.54	43.24	43.54
35.26	35.56	43.26	43.56
35.30	35.58	43.30	43.58
35.34	35.60	43.34	43.60
35.38	35.62	43.38	43.62
35.42	35.66	43.42	43.66

High VHF channels

152.24	152.84	158.10	158.70

UHF channels

931.0125	931.2625	931.5125	931.7625
931.0375	931.2875	931.5375	931.7875
931.0625	931.3125	931.5625	931.8125
931.0875	931.3375	931.5875	931.8375
931.1125	931.3625	931.6125	931.8625
931.1375	931.3875	931.6375	931.8875
931.1625	931.4125	931.6625	931.9125
931.1875	931.4375	931.6875	931.9375
931.2125	931.4625	931.7125	931.9625
931.2375	931.4875	931.7375	931.9875

(a) The 43 MHz channels may be assigned under developmental authorizations, pursuant to the requirements of § 22.411.

(b) Channels 931.8875, 931.9125, and 931.9375 MHz may be assigned only to transmitters providing nationwide network paging service.

(c) Upon application (FCC Form 401), common carriers may be authorized to provide one-way paging service using the leased subcarrier facilities of broadcast stations licensed under Part 73 of this chapter.

§ 22.533 Selection and assignment of 931-932 MHz channels.

The Commission selects and assigns a channel when granting applications for authorization to operate a new paging station to transmit in the 931-932 MHz frequency range. Applicants having a preference may request the assignment of a specific channel, but the Commission may in some cases be unable to satisfy such requests. Applications for authorization to operate a new paging station in an established nationwide paging network must specify the channel of the affiliated network (i.e. 931.8875, 931.9125 or 931.9375 MHz).

§ 22.535 Effective radiated power limits.

The effective radiated power (ERP) of base transmitters operating on the channels listed in § 22.531 must not exceed the limits in this section.

(a) Maximum ERP. The ERP must not exceed the applicable limits in this paragraph under any circumstances.

Frequency Range (MHz)	Maximum ERP (Watts)
35-36	600
43-44	500
152-159	1400
931-932	3500

(b) Basic power limits. Except as provided in paragraphs (d) and (e) of this section, the ERP of transmitters on the VHF channels must not exceed 500 Watts, and the ERP of transmitters on the 931-932 MHz channels must not exceed 1000 Watts.

(c) Height-power limit. Except as provided in paragraphs (d) and (e) of this section, the ERP must not exceed the amount that would result in an average distance to the service contour of 32.2 kilometers (20 miles). The average distance to the service contour is calculated by taking the arithmetic mean of the distances determined using the procedures specified in § 22.537 for the eight cardinal radial directions.

(d) Encompassed interfering contour areas. Transmitters are exempt from the basic power and height-power limits of this section if the area within their interfering contours is totally encompassed by the interfering contours of operating co-channel base transmitters controlled by the same licensee. For the purpose of this paragraph, operating transmitters are authorized transmitters that are providing service to the public.

(e) Nationwide network stations. Transmitters on the nationwide network paging channels (931.8875, 931.925, or 931.9375 MHz) are exempt from the basic power and height-power limits of this section.

(f) Adjacent channel protection. The ERP of transmitters must not exceed 500 Watts if they:

(1) transmit on a channel in the 152-159 MHz frequency range and are located less than 5 kilometers (3.1 miles) from any station licensed in the Private Radio Services that receives on an adjacent channel; or,

(2) transmit on channel 158.10 or 158.70 MHz and are located less than 5 kilometers (3.1 miles) from any station licensed in the Public Mobile Services that receives on either of the following adjacent channels: 158.07 MHz or 158.67 MHz.

§ 22.537 Technical channel assignment criteria.

The rules in this section establish technical assignment criteria for the channels listed in § 22.531. These criteria permit channel assignments to be made in a manner such that reception by public paging receivers of signals from base transmitters, within the service area of such base transmitters, is protected from interference caused by the operation of independent co-channel base transmitters.

(a) Contour overlap. The Commission may grant an application requesting assignment of a channel to a proposed base transmitter only if:

(1) the interfering contour of the proposed transmitter does not overlap the service contour of any protected co-channel transmitter controlled by a carrier other than the applicant, unless that carrier has agreed in writing to accept any interference that may result from operation of the proposed transmitter; and,

(2) the service contour of the proposed transmitter does not overlap the interfering contour of any protected co-channel transmitter controlled by a carrier other than the applicant, unless the applicant agrees to accept any interference that may result from operation of the protected co-channel transmitter; and,

(3) the area and/or population to which service would be provided by the proposed transmitter is substantial, and service gained would exceed that lost as a result of agreements to accept interference.

(b) Protected transmitter. For the purposes of this section, protected transmitters are authorized transmitters and transmitters proposed in prior-filed pending applications.

(c) VHF service contour. For paging stations transmitting on the VHF channels, the radial distance from the transmitting antenna to the service contour is calculated as follows:

$$d = 1.169 \times h^{0.40} \times p^{0.21}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(1) Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(2) The value used for p in the above formula must not be less than 27 dB less than the maximum ERP in any direction.

(d) VHF interfering contour. For paging stations transmitting on the VHF channels, the radial distance from the transmitting antenna to the interfering contour is calculated as follows:

$$d = 6.509 \times h^{0.28} \times p^{0.17}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(1) Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(2) The value used for p in the above formula must not be less than 27 dB less than the maximum ERP in any direction.

(e) 931 MHz service contour. For paging stations transmitting on the 931 MHz channels, the service contour is a circle, centered on the transmitting antenna, with a radius determined from Table E-1.

(f) 931 MHz interfering contour. For paging stations transmitting on the 931 MHz channels, the interfering contour is a circle, centered on the transmitting antenna, with a radius determined from Table E-2.

(g) In-building radiation systems. Licensees may install and operate in-building radiation systems without applying for authorization or notifying the Commission. In-building radiation systems operated under this paragraph may provide only public mobile service. The locations of in-building radiation systems must be within the service contour(s) of the licensee's authorized transmitter(s) on the same channel. In-building radiation systems are not protected facilities, and therefore do not have service or interfering contours.

§ 22.539 Additional channel policies.

The rules in this section govern the processing of applications for a paging channel when the applicant has applied or been granted an authorization for other paging channels in the same geographic area. The general policy of the Commission is to assign one paging channel in an area to a carrier per application cycle. That is, a carrier must apply for one paging channel, receive the authorization, construct the station, provide service to the public, and notify the Commission of commencement of service to the public before applying for an additional paging channel in that area. The rules in this section apply only to the channels listed in § 22.531, excluding the nationwide network paging channels.

Table E-1 - 931 MHz Paging Service Radii

Service Radius km (miles)	Effective Radiated Power (Watts)					
Antenna HAAT meters (feet)	0-125	126-250	251-500	501-1000	1001-1860	1861-3500
0-177 (0-581)	32.2 (20)	32.2 (20)	32.2 (20)	32.2 (20)	32.2 (20)	32.2 (20)
178-305 (582-1001)	32.2 (20)	32.2 (20)	32.2 (20)	32.2 (20)	37.0 (23)	41.8 (26)
306-427 (1002-1401)	32.2 (20)	32.2 (20)	37.0 (23)	41.8 (26)	56.3 (35)	56.3 (35)
428-610 (1402-2001)	32.2 (20)	37.0 (23)	41.8 (26)	56.3 (35)	56.3 (35)	56.3 (35)
611-861 (2002-2825)	37.0 (23)	41.8 (26)	41.8 (26)	56.3 (35)	83.7 (52)	83.7 (52)
862-1219 (2826-3999)	41.8 (26)	56.3 (35)	56.3 (35)	83.7 (52)	83.7 (52)	83.7 (52)
1220+ (4000+)	56.3 (35)	56.3 (35)	83.7 (52)	83.7 (52)	83.7 (52)	83.7 (52)

Table E-2 - 931 MHz Paging Interfering Radii

Interfering Radius km (miles)	Effective Radiated Power (Watts)					
Antenna HAAT meters (feet)	0-125	126-250	251-500	501-1000	1001-1860	1861-3500
0-177 (0-581)	80.5 (50)	80.5 (50)	80.5 (50)	80.5 (50)	80.5 (50)	80.5 (50)
178-305 (582-1001)	80.5 (50)	80.5 (50)	80.5 (50)	80.5 (50)	88.5 (55)	96.6 (60)
306-427 (1002-1401)	80.5 (50)	80.5 (50)	88.5 (55)	96.6 (60)	130.4 (81)	130.4 (81)
428-610 (1402-2001)	80.5 (50)	88.5 (55)	96.6 (60)	130.4 (81)	130.4 (81)	130.4 (81)
611-861 (2002-2825)	88.5 (55)	96.6 (60)	96.6 (60)	130.4 (81)	191.5 (119)	191.5 (119)
862-1219 (2826-3999)	96.6 (60)	130.4 (81)	130.4 (81)	191.5 (119)	191.5 (119)	191.5 (119)
1220+ (4000+)	130.4 (81)	130.4 (81)	191.5 (119)	191.5 (119)	191.5 (119)	191.5 (119)

(a) VHF transmitters in same area. Any transmitter on any VHF channel listed in § 22.531 is considered to be in the same geographic area as another transmitter on any other VHF channel listed in § 22.531 if:

(1) one transmitter location is within the service area of the other transmitter; or,

(2) the area within the overlap of the service contours of the two transmitters constitutes 50 percent or more of the service area of either of the transmitters.

(b) 931 MHz transmitters in same area. Any transmitter on any 931 MHz channel is considered to be in the same geographic area as another transmitter on any channel listed in § 22.531 if it is located less than 64.4 kilometers (40 miles) from that transmitter. Likewise, any transmitter on any channel listed in § 22.531 is considered to be in the same geographic area as another transmitter on any 931 MHz channel if it is located less than 64.4 kilometers (40 miles) from that transmitter.

(c) Initial channel. The Commission will not assign more than one channel for new paging stations. Paging stations are considered to be new if there are no authorized transmitters on any channel listed in § 22.531 controlled by the applicant in the same geographic area.

(d) Additional channel. Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, but to operate on a different channel, are considered as requesting an additional channel for the authorized station, unless paragraph (e) of this section applies.

(e) Additional transmitters on same channel. Notwithstanding other provisions of this section, applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same paging channel, are not considered to be requests for an additional paging channel.

(f) Amendment of pending application. If the Commission receives and accepts for filing an application for a transmitter to be located in the same geographic area as a transmitter proposed in a pending application previously filed by the applicant, but on a different channel, the subsequent application is considered as a major amendment to change the technical proposal of the prior application, unless paragraph (e) applies. The filing date of any application so amended is the date the Commission received the subsequent application.

(g) Dismissal of premature applications for additional channel. If the Commission receives an application requesting an additional channel for an authorized station prior to receiving notification that the station is providing service to the public on the authorized channel(s), the Commission may dismiss that application without prejudice as defective.

§ 22.551 Nationwide network paging service.

The rules in this section govern the application for and provision of nationwide network paging service on the channels reserved specifically for such service in § 22.531(b).

(a) Nationwide network organizers. If and when a nationwide network paging channel becomes available for assignment, the Commission will issue a Public Notice inviting applications from carriers seeking to organize a nationwide network paging service. The Public Notice will provide complete details regarding application requirements and procedures.

(c) Affiliated local carriers. Parties seeking to become affiliated local carriers in a nationwide network paging service must have specific completed contracts with the network organizer with which they are proposing to affiliate. Applications may contain a letter, in lieu of the contracts, indicating that the applicant has a completed contract with the organizer.

(d) Liability for technical operation. Nationwide network organizers and affiliated local carriers are jointly and severally liable for the technical operation of the local network stations.

§ 22.559 One-way paging application requirements.

In addition to information required by Subparts B and D and § 22.529 of this part, applications for authorization to operate a paging transmitter on the channels listed in § 22.531 must contain the applicable supplementary information described in this section.

(a) Interference exhibit. Except as provided in paragraph (b) of this section, an exhibit demonstrating compliance with § 22.537 with regard to protected transmitters is required for applications to operate a transmitter on the VHF channels. This exhibit must:

(1) identify each protected transmitter located within 109 kilometers (68 miles) of the proposed transmitter in directions in which the distance to the interfering contour is 76.5 kilometers (47.5 miles) or less, and within 178 kilometers (111 miles) of the proposed transmitter in directions in which the distance to the interfering contour exceeds 76.5 kilometers (47.5 miles).

(2) for each protected transmitter identified, show the results of distance calculations indicating that there would be no overlap of service and interfering contours, or alternatively, indicate that the licensee of or applicant for the protected transmitter and/or the applicant, as required, have agreed in writing to accept any interference resulting from operation of the proposed transmitter.

(b) Encompassment exhibit. An exhibit showing that the area within the interfering contour of the proposed transmitter would be totally encompassed by interfering contours of operating co-channel base transmitters controlled by the applicant is required for applications to operate a transmitter with ERP exceeding the basic power and height-power limits of § 22.535. For VHF transmitters, this encompassment exhibit may substitute for the interference exhibit required in paragraph (a) of this section.

ONE-WAY OR TWO-WAY MOBILE OPERATION

§ 22.561 Channels for one-way or two-way mobile operation.

The following channels are allocated for paired assignment to transmitters that provide (or support other transmitters that provide) one-way or two-way public land mobile service. These channels may be assigned for use by mobile or base transmitters as indicated, and to fixed transmitters (including control, repeater or other fixed transmitters). The mobile channels may also be assigned for use by base or fixed transmitters under certain circumstances (see § 22.567(b) and § 22.147(b)). Unless otherwise indicated, all

channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

VHF channels

base	mobile	base	mobile
152.03	158.49	152.57	157.83
152.06	158.52	152.60	157.86
152.09	158.55	152.63	157.89
152.12	158.58	152.66	157.92
152.15	158.61	152.69	157.95
152.18	158.64	152.72	157.98
152.21	158.67	152.75	158.01
152.51	157.77	152.78	158.04
152.54	157.80	152.81	158.07

UHF channels

base	mobile	base	mobile
454.025	459.025	454.350	459.350
454.050	459.050	454.375	459.375
454.075	459.075	454.400	459.400
454.100	459.100	454.425	459.425
454.125	459.125	454.450	459.450
454.150	459.150	454.475	459.475
454.175	459.175	454.500	459.500
454.200	459.200	454.525	459.525
454.225	459.225	454.550	459.550
454.250	459.250	454.575	459.575
454.275	459.275	454.600	459.600
454.300	459.300	454.625	459.625
454.325	459.325	454.650	459.650

§ 22.563 Provision of rural radio service upon request.

Channels in the frequency ranges 152.03-152.81, 157.77-158.67, 454.025-454.650 and 459.025-459.650 MHz, inclusive, are also allocated for assignment in the Rural Radio Service. Stations in the Paging and Radiotelephone Service authorized to provide public mobile service on these channels must also provide rural radio service upon request from a subscriber.

§ 22.565 Transmitting power limits.

The transmitting power of base, mobile and fixed transmitters operating on the channels listed in § 22.561 must not exceed the limits in this section.

(a) Maximum ERP. The effective radiated power (ERP) of base and fixed transmitters must not exceed the applicable limits in this paragraph under any circumstances.

Frequency Range (MHz)	Maximum ERP (Watts)
152-153	1400
157-159	150
454-455	3500
459-460	150

(b) Basic power limit. Except as provided in paragraph (d) of this section, the ERP of base transmitters must not exceed 500 Watts.

(c) Height-power limits. Except as provided in paragraph (d) of this section, the ERP of base transmitters must not exceed the amount that would result in an average distance to the service contour of 41.8 kilometers (26 miles) for VHF channels or 30.6 kilometers (19 miles) for UHF channels. The average distance to the service contour is calculated by taking the arithmetic mean of the distances determined using the procedures specified in § 22.567 for the eight cardinal radial directions.

(d) Encompassed interfering contour areas. Base transmitters are exempt from the basic power and height-power limits of this section if the area within their interfering contours is totally encompassed by the interfering contours of operating co-channel base transmitters controlled by the same licensee. For the purpose of this paragraph, operating transmitters are authorized transmitters that are providing service to the public.

(e) Adjacent channel protection. The ERP of base and fixed transmitters must not exceed 500 Watts if they transmit on channel 454.025 MHz and are located less than 7 kilometers (4.3 miles) from a Petroleum Radio Service station receiving on adjacent channel 454.0000 MHz.

(f) Mobile transmitters. The transmitter output power of mobile transmitters must not exceed 60 watts.

(g) Other transmitters. The ERP of dispatch and auxiliary test transmitters must not exceed 100 watts.

§ 22.567 Technical channel assignment criteria.

The rules in this section establish technical assignment criteria for the channels listed in § 22.561.

(a) Protection for mobile receivers. The criteria in paragraphs (a)(1) through (a)(6) permit channel assignments to be made in a manner such that reception by public mobile receivers of signals from base transmitters, within the service area of such base transmitters, is protected from interference caused by the operation of independent co-channel base and fixed transmitters.

(1) Contour overlap. The Commission may grant an application requesting assignment of a channel to a proposed base or fixed transmitter only if:

(i) the interfering contour of the proposed transmitter does not overlap the service contour of any protected co-channel transmitter controlled by a carrier other than the applicant, unless that carrier has agreed in writing to accept any interference that may result from operation of the proposed transmitter; and,

(ii) the service contour of the proposed transmitter does not overlap the interfering contour of any protected co-channel transmitter controlled by a carrier other than the applicant, unless the application contains a statement that the applicant agrees to accept any interference that may result from operation of the protected co-channel transmitter; and,

(iii) the area and/or population to which service would be provided by the proposed transmitter is substantial, and service gained would exceed that lost as a result of agreements to accept interference.

(2) Protected transmitter. For the purposes of this section, protected transmitters are authorized transmitters and transmitters

proposed in prior-filed pending applications in both the Paging and Radiotelephone Service and the Rural Radiotelephone Service.

(3) VHF service contour. For base stations transmitting on the VHF channels, the radial distance from the transmitting antenna to the service contour is calculated as follows:

$$d = 1.527 \times h^{0.40} \times p^{0.21}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(i) Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(ii) The value used for p in the above formula must not be less than 27 dB less than the maximum ERP in any direction.

(4) VHF interfering contour. For base and fixed stations transmitting on the VHF channels, the radial distance from the transmitting antenna to the interfering contour is calculated as follows:

(i) if the radial antenna HAAT is less than 150 meters:

$$d = 8.577 \times h^{0.24} \times p^{0.19}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(ii) if the radial antenna HAAT is 150 meters or more:

$$d = 12.306 \times h^{0.23} \times p^{0.14}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(iii) The value used for p in the above formulas must not be less than 27 dB less than the maximum ERP in any direction.

(5) UHF service contour. For base stations transmitting on the UHF channels, the radial distance from the transmitting antenna to the service contour is calculated as follows:

$$d = 1.739 \times h^{0.35} \times p^{0.18}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(i) Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(ii) The value used for p in the above formula must not be less than 27 dB less than the maximum ERP in any direction.

(6) UHF interfering contour. For base and fixed stations transmitting on the UHF channels, the radial distance from the transmitting antenna to the interfering contour is calculated as follows:

(i) if the radial antenna HAAT is less than 150 meters:

$$d = 9.471 \times h^{0.23} \times p^{0.15}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(ii) if the radial antenna HAAT is 150 meters or more:

$$d = 6.336 \times h^{0.31} \times p^{0.15}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(iii) The value used for p in the above formulas must not be less than 27 dB less than the maximum ERP in any direction.

(b) Protection for fixed receivers. This paragraph applies only to assignment of the channels designated in § 22.561 as mobile channels to base and fixed transmitters. The criteria in this section permit channel assignments to be made in a manner such that reception by public base and fixed receivers of signals from associated mobile and fixed transmitters is protected from interference caused by the operation of independent co-channel base and fixed transmitters.

(1) Mobile channels are assigned to base and fixed transmitters only if the paired base channel, as designated in § 22.561, is assigned to base transmitters in the same geographical area operated by the same licensee.

(2) [reserved]

§ 22.569 Additional channel policies.

The rules in this section govern the processing of applications for a mobile channel when the applicant has applied or been granted an authorization for other mobile channels in the same geographic area. The general policy of the Commission is to assign no more than two channels in an area to a carrier per application cycle. That is, a carrier must apply for no more than two channels, receive the authorization, construct the station, provide service to the public, and notify the Commission of commencement of service to the public before applying for additional mobile channels in that area. The rules in this section apply only to the channels listed in § 22.561.

(a) Transmitters in same area. Any transmitter on any channel listed in § 22.561 is considered to be in the same geographic area as another transmitter on any other channel listed in § 22.561 if:

(1) one transmitter location is within the service area of the other transmitter; or,

(2) the area within the overlap of the service contours of the two

transmitters constitutes 50 percent or more of the service area of either of the transmitters.

(b) Initial channel. The Commission will not assign more than two channels for new stations. Stations are considered to be new if there are no authorized transmitters on any channel listed in § 22.561 controlled by the applicant in the same geographic area.

(c) Additional channel. Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, but to operate on a different channel, are considered as requests for an additional channel for the authorized station, unless paragraph (d) of this section applies.

(d) Additional transmitters on same channel. Notwithstanding other provisions of this section, applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same channel, are not considered as requests for an additional channel.

(f) Dismissal of application constituting cumulative request for more than two channels. If the Commission receives an application for a transmitter to be located in the same geographic area as a transmitter proposed in a pending application previously filed by the applicant, but on different channels such that, considered together, the applications would constitute a request for more than two channels, the Commission may dismiss the subsequent application without prejudice.

(g) Dismissal of premature applications for additional channel. If the Commission receives an application requesting two additional channels (or one additional channel) for an authorized station prior to receiving notification that the station is providing service to the public on all (or all except one) of the authorized channels, the Commission may dismiss that application without prejudice.

§ 22.571 Responsibility for mobile stations.

Mobile stations that are subscribers in good standing to a two-way service in the Paging and Radiotelephone Service are, when receiving service from that station pursuant to legally effective tariff provisions, considered to be operating under the authorization of that station. Licensees are responsible for exercising effective operational control over mobile stations receiving service through their stations.

(a) Installation, maintenance and repair. Except for subscriber-provided mobile transmitters, licensees are responsible for the proper installation, maintenance and repair of mobile transmitters. Subscribers are responsible for the proper installation, maintenance and repair of subscriber-provided mobile transmitters.

(b) Roamers. Mobile stations that are subscribers in good standing to a two-way service in the Paging and Radiotelephone Service are, while receiving service from a different station pursuant to legally effective tariff provisions, considered to be operating under the authorization of such different station. The licensee of such different station is responsible, during such temporary period, for such mobile stations as if they were subscribers to it.

§ 22.573 Use of base transmitters as repeaters.

As an additional function, base transmitters may be used as repeaters. Licensees must be able to turn the base transmitter on or off from the control point regardless of whether a subscriber-operated transmitter is transmitting.

§ 22.575 Use of mobile channel for control transmitter.

Carriers may be authorized to control base transmitters using a control transmitter on the paired mobile channel, subject to the conditions in this section. Control transmitters authorized pursuant to the provisions of this section do not have to meet the requirements of § 22.567(b).

(a) This method of control must not be used in any situation in which transmissions from subscriber-operated transmitters would be able to override the functions of the control transmitter.

(b) The control transmitter must be equipped to use coded signals to shut down and reactivate the base transmitter. Additional coded signals may be used for essential functions at the base transmitter, e.g., controlling aeronautical obstruction marking lights on the antenna tower.

(c) Radio equipment in the premises or vehicles of subscribers must be incapable of reactivating the base transmitter after it has been shut down by the licensee.

(d) The control transmitter location must be within the composite service contour of the station on the paired base channel.

§ 22.577 Grandfathered dispatch service.

No new dispatch transmitters or dispatch points are authorized. Carriers that were authorized to provide dispatch service prior to January 1, 1982, and have provided such service continuously since that date may continue to provide such service.

(a) Installation. A grandfathered station licensee may install a dispatch transmitter for one or more subscribers without applying for specific authorization, provided that the following conditions are met.

(1) The dispatch transmitter must use the mobile channel that is paired with the channel used by the grandfathered base station.

(2) The dispatch transmitter antenna must not exceed the criteria in § 17.7 of this chapter that determine whether the FAA must be notified of the proposed construction.

(3) The output power of the dispatch transmitter must not exceed 10 Watts.

(4) The dispatch transmitter must be incapable of overriding the functioning of any control transmitter that may be using the same channel.

(5) The dispatch transmitter must be under the continuous supervision of the licensee.

(b) Notification. Licensees must notify the Commission whenever a dispatch transmitter is installed pursuant to paragraph (a) of this section. The notification must include the name and address of the subscriber(s) for which the dispatch transmitter was installed, the location of the dispatch transmitter, the height of antenna structure above ground and above mean sea level, the channel(s) used, and the call sign and location of the grandfathered base station.

(c) Termination without hearing. Operation of a dispatch transmitter pursuant to paragraphs (a) and (b) of this section may be terminated by the Commission without a hearing upon notice to the licensee.

(d) Dispatch transmitters requiring authorization. A dispatch transmitter that does not meet the requirements of paragraph (a) of this section may be installed only upon grant of an application for authorization therefor.

(e) Permissible communications. A dispatch transmitter operated by a subscriber may communicate only with mobile transmitters operated by that subscriber through the associated base transmitter.

§ 22.579 Operation of mobiles across U.S.-Canada border.

Mobile stations licensed by Canada may receive two-way service while in the United States from stations licensed under this part, after authorization has been granted by the Commission. Mobile stations that normally operate under the authority of base stations licensed under this part may receive two-way service while in Canada from stations licensed under this part or by Canada, upon authorization by Canada.

§ 22.589 One-way or two-way application requirements.

In addition to information required by Subparts B and D and § 22.529 of this part, applications for authorization to operate a transmitter on the channels listed in § 22.561 must contain the applicable supplementary information described in this section.

(a) Interference exhibit. Except as provided in paragraph (b) of this section, an exhibit demonstrating compliance with § 22.567 with regard to protected transmitters is required. This exhibit must:

(1) for UHF channels, identify each protected transmitter located within 108 kilometers (67 miles) of the proposed transmitter in directions in which the distance to the interfering contour is 76.4 kilometers (47.5 miles) or less, and within 178 kilometers (111 miles) of the proposed transmitter in directions in which the distance to the interfering contour exceeds 76.4 kilometers (47.5 miles).

(2) for VHF channels, identify each protected transmitter located within 135 kilometers (84 miles) of the proposed transmitter in directions in which the distance to the interfering contour is 93.3 kilometers (58 miles) or less, and within 178 kilometers (111 miles) of the proposed transmitter in directions in which the distance to the interfering contour exceeds 93.3 kilometers (58 miles).

(3) for each protected transmitter identified, show the results of distance calculations indicating that there would be no overlap of service and interfering contours, or alternatively, indicate that the licensee of or applicant for the protected transmitter and/or the applicant, as required, have agreed in writing to accept any interference resulting from operation of the proposed transmitter.

(b) Encompassment exhibit. An exhibit showing that the area within the interfering contour of the proposed transmitter would be totally encompassed by interfering contours of operating co-channel base transmitters controlled by the applicant is required for applications to operate a transmitter with ERP exceeding the basic power and height-power limits of § 22.565. This encompassment exhibit may substitute for the interference exhibit required in paragraph (a) of this section.

POINT-TO-POINT OPERATION

§ 22.591 Channels for point-to-point operation.

The following channels are allocated for assignment to fixed transmitters that support other transmitters that provide public mobile service. Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

VHF channels

72.02	72.36	72.80	75.66
72.04	72.38	72.82	75.68
72.06	72.40	72.84	75.70
72.08	72.42	72.86	75.72
72.10	72.46	72.88	75.74
72.12	72.50	72.90	75.76
72.14	72.54	72.92	75.78
72.16	72.58	72.94	75.80
72.18	72.62	72.96	75.82
72.20	72.64	72.98	75.84
72.22	72.66	75.42	75.86
72.24	72.68	75.46	75.88
72.26	72.70	75.50	75.90
72.28	72.72	75.54	75.92
72.30	72.74	75.58	75.94
72.32	72.76	75.62	75.96
72.34	72.78	75.64	75.98

UHF channels - State of Hawaii

488.250 ..... 491.250	489.750 ..... 492.750
488.750 ..... 491.750	490.250 ..... 493.250
489.250 ..... 492.250	490.750 ..... 493.750

Microwave channels

(bandwidth individually assigned)

2110.1	2160.1
2110.2	2160.2
2110.3	2160.3
|	|
|	|
|	|
2129.9	2179.9

(a) The 72-76 MHz channels may be assigned under developmental authority pursuant to the requirements of § 22.413.

(b) Channels in the frequency ranges 2110-2130 and 2160-2180 MHz are also allocated for assignment in the Multipoint Distribution Service and the Point-to-Point Microwave Radio Service (see Part 21 of this chapter).

(c) Channels in the frequency ranges 488.250-490.750 and 491.250-493.750 MHz may be assigned only to inter-island fixed stations located in the State of Hawaii.

§ 22.593 Effective radiated power limits.

The effective radiated power of fixed stations operating on the channels listed in § 22.591 must not exceed 150 Watts.

§ 22.599 Assignment of 72-76 MHz channels.

Because of the potential for interference to the reception of TV Channels 4 and 5 by broadcast television sets and video recorders, assignments of the 72-76 MHz channels are subject to the following conditions:

(a) Assignments of 72-76 MHz channels for use within 129 kilometers (80 miles) of a full service TV station transmitting on TV Channel 4 or 5 are subject to the condition that the licensee must eliminate any interference caused to television reception on TV Channels 4 and 5. If the Commission notifies the licensee of an interference problem and the licensee does not resolve the problem within 90 days of such notification, operation of the interfering 72-76 MHz fixed station must be immediately discontinued.

(b) 72-76 MHz channels may be assigned for use within 16 kilometers (10 miles) of a full service TV station transmitting on TV Channel 4 or 5 under a developmental authorization, pursuant to § 22.413. However, for use within 50 meters (164 feet) of a TV station transmitting on TV Channel 4 or 5, 72-76 MHz channels may be assigned under a regular authorization, rather than a developmental authorization.

§ 22.601 Assignment of microwave channels.

Before filing applications for authority to operate stations on the microwave channels listed in § 22.591 or major amendments to such applications, carriers must coordinate the planned channel usage, using the procedure outlined in § 22.150, with affected parties in this radio service and the Point-to-point Microwave Service and the Multipoint Distribution Service. Affected parties are licensees and other applicants with previously filed pending applications whose stations could affect or be affected by operation of the proposed station in terms of interference or restricted ultimate system capacity.

(a) Coordination required. In designing a system or modification thereto, the applicant must select sites, equipment and channels that will avoid harmful interference to all other users. All parties must cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party receiving notification is not obligated to suggest changes or re-design a proposal in cases involving conflicts. Applicants should make every reasonable effort to avoid blocking the growth of systems that are likely to need additional capacity in the foreseeable future. The applicant must identify in the application all parties with which the technical proposal was coordinated. In the event that technical problems are not resolved or if an affected party does not respond to coordination efforts within 30 days after notification, an explanation must be contained in the application. Where technical conflicts are resolved by an agreement between the parties that requires special procedures to reduce the likelihood of harmful interference (such as the use of artificial site shielding), or would result in a reduction of quality or capacity of either system, the details thereof must be contained in the application.

(b) Channel selection. In each of these ranges, the applicant must select the highest available channel that would not cause harmful interference to any other stations. For new stations to be located within 80 kilometers (50 miles) of the metropolitan areas listed in § 21.901(c), channels in the 2160-2162 MHz range will not be assigned unless the applicant shows that no alternative channels are available.

(c) Bandwidth. Applicants must request the minimum emission bandwidth necessary to serve the purpose required, including future plans. The Commission will not authorize bandwidths larger than 800 kHz.

§ 22.603 488-494 MHz fixed service in Hawaii.

Before filing applications for authorization of inter-island control and/or repeater stations, applicants must coordinate the planned channel usage with existing licensees and other applicants with previously filed applications, using the procedure outlined in § 22.150. Applicants and licensees shall cooperate fully and make reasonable efforts to resolve any channel usage conflicts. In situations where technical solutions to such conflicts cannot be devised, the Commission may select a channel or channels to assign or may designate the application(s) for hearing. To be acceptable for filing, applications and major technical amendments must contain a certification that coordination has been completed and an exhibit listing the name(s) of the licensees and applicants with which the planned channel usage has been coordinated.

POINT-TO-MULTIPOINT OPERATION

§ 22.621 Channels for point-to-multipoint operation.

The following channels are allocated for assignment to transmitters utilized within point-to-multipoint systems that support transmitters that provide public mobile service. Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

Public Mobile Pool

(25 kHz bandwidth)

928.8625 ..... 959.8625	928.9375 ..... 959.9375
928.8875 ..... 959.8875	928.9625 ..... 959.9625
928.9125 ..... 959.9125	928.9875 ..... 959.9875

(12.5 kHz bandwidth)

928.85625 ... 959.85625	928.93125 ... 959.93125
928.86875 ... 959.85625	928.94375 ... 959.94375
928.88125 ... 959.88125	928.95625 ... 959.95625
928.89375 ... 959.89375	928.96875 ... 959.96875
928.90625 ... 959.90625	928.98125 ... 959.98125
928.91875 ... 959.91875	928.99375 ... 959.99375

Private Radio General Access Pool

(25 kHz bandwidth)

956.2625	956.3125	956.3625	956.4125
956.2875	956.3375	956.3875	956.4375

928.0125 ..... 952.0125	928.1875 ..... 952.1875
928.0375 ..... 952.0375	928.2125 ..... 952.2125
928.0625 ..... 952.0625	928.2375 ..... 952.2375
928.0875 ..... 952.0875	928.2625 ..... 952.2625
928.1125 ..... 952.1125	928.2875 ..... 952.2875
928.1375 ..... 952.1375	928.3125 ..... 952.3125
928.1625 ..... 952.1625	928.3375 ..... 952.3375

(12.5 kHz bandwidth)

956.25625	956.30625	956.35625	956.40625
956.26875	956.31875	956.36875	956.41875
956.28125	956.33125	956.38125	956.43125
956.29375	956.34375	956.39375	956.44375

928.00625 ... 952.00625	928.18125 ... 952.18125
928.01875 ... 952.01875	928.19375 ... 952.19375
928.03125 ... 952.03125	928.20625 ... 952.20625
928.04375 ... 952.04375	928.21875 ... 952.21875
928.05625 ... 952.05625	928.23125 ... 952.23125
928.06875 ... 952.06875	928.24375 ... 952.24375
928.08125 ... 952.08125	928.25625 ... 952.25625
928.09375 ... 952.09375	928.26875 ... 952.26875
928.10625 ... 952.10625	928.28125 ... 952.28125
928.11875 ... 952.11875	928.29375 ... 952.29375
928.13125 ... 952.13125	928.30625 ... 952.30625
928.14375 ... 952.14375	928.31875 ... 952.31875
928.15625 ... 952.15625	928.33125 ... 952.33125
928.16875 ... 952.16875	928.34375 ... 952.34375

Private Radio Power Pool

(25 kHz bandwidth)

928.3625 ..... 952.3625	928.6125 ..... 952.6125
928.3875 ..... 952.3875	928.6375 ..... 952.6375
928.4125 ..... 952.4125	928.6625 ..... 952.6625
928.4375 ..... 952.4375	928.6875 ..... 952.6875
928.4625 ..... 952.4625	928.7125 ..... 952.7125
928.4875 ..... 952.4875	928.7375 ..... 952.7375
928.5125 ..... 952.5125	928.7625 ..... 952.7625
928.5375 ..... 952.5375	928.7875 ..... 952.7875
928.5625 ..... 952.5625	928.8125 ..... 952.8125
928.5875 ..... 952.5875	928.8375 ..... 952.8375

(12.5 kHz bandwidth)

928.35625 ... 952.35625	928.60625 ... 952.60625
928.36875 ... 952.36875	928.61875 ... 952.61875
928.38125 ... 952.38125	928.63125 ... 952.63125
928.39375 ... 952.39375	928.64375 ... 952.64375
928.40625 ... 952.40625	928.65625 ... 952.65625
928.41875 ... 952.41875	928.66875 ... 952.66875
928.43125 ... 952.43125	928.68125 ... 952.68125
928.44375 ... 952.44375	928.69375 ... 952.69375
928.45625 ... 952.45625	928.70625 ... 952.70625
928.46875 ... 952.46875	928.71875 ... 952.71875
928.48125 ... 952.48125	928.73125 ... 952.73125
928.49375 ... 952.49375	928.74375 ... 952.74375
928.50625 ... 952.50625	928.75625 ... 952.75625
928.51875 ... 952.51875	928.76875 ... 952.76875
928.53125 ... 952.53125	928.78125 ... 952.78125
928.54375 ... 952.54375	928.79375 ... 952.79375
928.55625 ... 952.55625	928.80625 ... 952.80625
928.56875 ... 952.56875	928.81875 ... 952.81875
928.58125 ... 952.58125	928.83125 ... 952.83125
928.59375 ... 952.59375	928.84375 ... 952.84375

Public, Private, Government Shared Pool

(12.5 kHz bandwidth)

932.00625 ... 941.00625	932.25625 ... 941.25625
932.01875 ... 941.01875	932.26875 ... 941.26875
932.03125 ... 941.03125	932.28125 ... 941.28125
932.04375 ... 941.04375	932.29375 ... 941.29375
932.05625 ... 941.05625	932.30625 ... 941.30625
932.06875 ... 941.06875	932.31875 ... 941.31875
932.08125 ... 941.08125	932.33125 ... 941.33125
932.09375 ... 941.09375	932.34375 ... 941.34375
932.10625 ... 941.10625	932.35625 ... 941.35625
932.11875 ... 941.11875	932.36875 ... 941.36875
932.13125 ... 941.13125	932.38125 ... 941.38125
932.14375 ... 941.14375	932.39375 ... 941.39375
932.15625 ... 941.15625	932.40625 ... 941.40625
932.16875 ... 941.16875	932.41875 ... 941.41875
932.18125 ... 941.18125	932.43125 ... 941.43125
932.19375 ... 941.19375	932.44375 ... 941.44375
932.20625 ... 941.20625	932.45625 ... 941.45625
932.21875 ... 941.21875	932.46875 ... 941.46875
932.23125 ... 941.23125	932.48125 ... 941.48125
932.24375 ... 941.24375	932.49375 ... 941.49375

UHF Channels in Specified Urban Areas

Boston

470.0125	473.0125	482.0125	485.0125
470.0375	473.0375	482.0375	485.0375
470.0625	473.0625	482.0625	485.0625
470.0875	473.0875	482.0875	485.0875
470.1125	473.1125	482.1125	485.1125
470.1375	473.1375	482.1375	485.1375
470.1625	473.1625	482.1625	485.1625
470.1875	473.1875	482.1875	485.1875
470.2125	473.2125	482.2125	485.2125
470.2375	473.2375	482.2375	485.2375
470.2625	473.2625	482.2625	485.2625
470.2875	473.2875	482.2875	485.2875

Chicago, Cleveland

470.0125	473.0125	476.0125	479.0125
470.0375	473.0375	476.0375	479.0375
470.0625	473.0625	476.0625	479.0625
470.0875	473.0875	476.0875	479.0875
470.1125	473.1125	476.1125	479.1125
470.1375	473.1375	476.1375	479.1375
470.1625	473.1625	476.1625	479.1625
470.1875	473.1875	476.1875	479.1875
470.2125	473.2125	476.2125	479.2125
470.2375	473.2375	476.2375	479.2375
470.2625	473.2625	476.2625	479.2625
470.2875	473.2875	476.2875	479.2875

New York - Northeastern New Jersey

470.0125	470.1625	476.0125	476.1625
470.0375	470.1875	476.0375	476.1875
470.0625	470.2125	476.0625	476.2125
470.0875	470.2375	476.0875	476.2375
470.1125	470.2625	476.1125	476.2625
470.1375	470.2875	476.1375	476.2875

Dallas-Fort Worth

482.0125	482.1625	485.0125	485.1625
482.0375	482.1875	485.0375	485.1875
482.0625	482.2125	485.0625	485.2125
482.0875	482.2375	485.0875	485.2375
482.1125	482.2625	485.1125	485.2625
482.1375	482.2875	485.1375	485.2875

Detroit

476.0125	479.0125	482.0125	485.0125
476.0375	479.0375	482.0375	485.0375
476.0625	479.0625	482.0625	485.0625
476.0875	479.0875	482.0875	485.0875
476.1125	479.1125	482.1125	485.1125
476.1375	479.1375	482.1375	485.1375
476.1625	479.1625	482.1625	485.1625
476.1875	479.1875	482.1875	485.1875
476.2125	479.2125	482.2125	485.2125
476.2375	479.2375	482.2375	485.2375
476.2625	479.2625	482.2625	485.2625
476.2875	479.2875	482.2875	485.2875

Houston

488.1625	491.1625	488.2375	491.2375
488.1875	491.1875	488.2625	491.2625
488.2125	491.2125	488.2875	491.2875

Los Angeles

470.0125	473.0125	506.0625	509.0625
470.0375	473.0375	506.0875	509.0875
506.0125	509.0125	506.1125	509.1125
506.0375	509.0375		

Miami

470.0125	470.1625	473.0125	473.1625
470.0375	470.1875	473.0375	473.1875
470.0625	470.2125	473.0625	473.2125
470.0875	470.2375	473.0875	473.2375
470.1125	470.2625	473.1125	473.2625
470.1375	470.2875	473.1375	473.2875

Philadelphia

500.0125	503.0125	506.0125	509.0125
500.0375	503.0375	506.0375	509.0375
500.0625	503.0625	506.0625	509.0625
500.0875	503.0875	506.0875	509.0875
500.1125	503.1125	506.1125	509.1125
500.1375	503.1375	506.1375	509.1375
500.1625	503.1625	506.1625	509.1625
500.1875	503.1875	506.1875	509.1875
500.2125	503.2125	506.2125	509.2125
500.2375	503.2375	506.2375	509.2375
500.2625	503.2625	506.2625	509.2625
500.2875	503.2875	506.2875	509.2875

Pittsburgh

470.0125	470.1625	473.0125	473.1625
470.0375	470.1875	473.0375	473.1875
470.0625	470.2125	473.0625	473.2125
470.0875	470.2375	473.0875	473.2375
470.1125	470.2625	473.1125	473.2625
470.1375	470.2875	473.1375	473.2875

San Francisco

482.0125	485.0125	488.0125	491.0125
482.0375	485.0375	488.0375	491.0375
482.0625	485.0625	488.0625	491.0625
482.0875	485.0875	488.0875	491.0875
482.1125	485.1125	488.1125	491.1125
482.1375	485.1375	488.1375	491.1375
482.1625	485.1625	488.1625	491.1625
482.1875	485.1875	488.1875	491.1875
482.2125	485.2125	488.2125	491.2125
482.2375	485.2375	488.2375	491.2375
482.2625	485.2625	488.2625	491.2625
482.2875	485.2875	488.2875	491.2875

Washington, DC

488.0125	491.0125	494.0125	497.0125
488.0375	491.0375	494.0375	497.0375
488.0625	491.0625	494.0625	497.0625
488.0875	491.0875	494.0875	497.0875
488.1125	491.1125	494.1125	497.1125
488.1375	491.1375	494.1375	497.1375
488.1625	491.1625	494.1625	497.1625
488.1875	491.1875	494.1875	497.1875
488.2125	491.2125	494.2125	497.2125
488.2375	491.2375	494.2375	497.2375
488.2625	491.2625	494.2625	497.2625
488.2875	491.2875	494.2875	497.2875

(a) Channels in the Private Radio General Access Pool and the Private Radio Power Pool may be assigned only if the applicant shows that none of the channels in the Public Mobile Pool are available for the proposed use.

(b) Channels in the Public, Private, Government Shared Pool are allocated for assignment in the Private Operational-Fixed Microwave Service (47 CFR Part 94) and to U.S. government fixed stations.

§ 22.623 System configuration.

This section requires a minimum configuration for point-to-multipoint systems using the channels listed in § 22.621.

(a) 928-960 MHz. These channels may be assigned, individually or paired, only to fixed transmitters in a system that controls at least four public mobile base transmitters that transmit on the same channel. If a 932-933 MHz channel and a 941-942 MHz channel are assigned as a pair, the 941-942 MHz channel must be assigned only to control transmitters; the 932-933 MHz channel may be assigned to control or fixed relay transmitters.

(b) 470-512 MHz. These channels may be assigned only individually (unpaired), to control transmitters that directly control at least four public mobile base transmitters that transmit on the same channel. Fixed relay transmitters will not be authorized.

(c) Selection and assignment. The Commission selects and assigns a channel when granting applications for authorization to operate a new station to transmit in the 470-512, 932-933 and 941-942 MHz frequency ranges. Applicants having a preference may request the assignment of a specific channel or channel pair, but the Commission may in some cases be unable to satisfy such requests.

§ 22.625 Transmitter locations.

This section governs where point-to-multipoint transmitters on the channels listed in § 22.621 may be located.

(a) 928-960 MHz. In this frequency range, the required minimum distance separation between co-channel fixed transmitters is 113 kilometers (70 miles). However, this requirement may be waived if the applicant submits an engineering analysis that shows that no interference would be caused to either system. In such a case, a developmental authorization may be issued (see § 22.415). If no interference is experienced during the term of the developmental authorization, the licensee may apply for a regular authorization.

(b) 470-512 MHz. The purpose of the rule in paragraph (b)(1) of this section is to define the areas in which the 470-512 MHz channels are allocated for public mobile use. The purpose of the rules in paragraphs (b)(2) and (b)(3) of this section is to reduce the likelihood that interference to television reception from public mobile operations on these channels will occur.

(1) Control transmitter locations. Control transmitter locations must be within 80 kilometers (50 miles) of the designated locations in this paragraph.

Urban area	N. Latitude	W. Longitude
Boston, MA	42°21'24"	71°03'24"
Chicago, IL	41°52'28"	87°38'22"
Cleveland, OH	41°29'51"	81°41'50"
Dallas, TX	32°47'09"	96°47'37"
Detroit, MI	42°19'48"	83°02'57"
Houston, TX	29°45'26"	95°21'37"
Los Angeles, CA	34°03'15"	118°14'28"
Miami, FL	25°46'37"	80°11'32"
New York, NY	40°45'06"	73°59'39"
Philadelphia, PA	39°56'58"	75°09'21"
Pittsburgh, PA	40°26'19"	80°00'00"
San Francisco-Oakland, CA	37°46'39"	122°24'40"
Washington, DC	38°53'51"	77°00'33"

(2) Protection from intermodulation interference. Control transmitter locations must be at least 1.6 kilometers (1 mile) from the main transmitter locations of all TV stations transmitting on TV channels separated by 2, 3, 4, 5, 7, or 8 TV channels from the TV channel containing the frequencies on which the control station will transmit. This requirement is intended to reduce the likelihood of intermodulation interference.

(3) Co-channel protection from control transmitters with high antennas. This paragraph applies only to control transmitters that utilize an antenna height of more than 152 meters (500 feet) above average terrain. The distance between the location of such a control transmitter and the applicable protected TV station location specified in this paragraph must equal or exceed the sum of the distance from the control transmitter location to the radio horizon in the direction of the specified location and 89 kilometers (55 miles - representing the distance from the main transmitter location of the TV station to its Grade B contour in the direction of the control transmitter). The protected TV station locations in this paragraph are the locations of record as of September 1974, and these do not change even though the TV stations may have been subsequently relocated.

(i) The protected TV station locations are as follows:

Control Transmitter Frequency Range	Protected TV Station Location		
470-476 MHz	Washington, DC	38°57'17"	77°00'17"
476-482 MHz	Lancaster, PA	40°15'45"	76°27'49"

(ii) The distance to the radio horizon is calculated using the following formula:

$$d = \sqrt{17 \times h}$$

where d is the distance to the radio horizon in kilometers
h is the height of the antenna center of radiation above ground level in meters

§ 22.627 Effective radiated power limits.

The effective radiated power (ERP) of transmitters operating on the channels listed in § 22.621 must not exceed the limits in this section.

(a) Maximum ERP. The ERP must not exceed the applicable limits in this paragraph under any circumstances.

Frequency Range (MHz)	Maximum ERP (Watts)
470-512	1000
928-929	50
932-933	30
941-942	600
952-960	150

(b) 470-512 MHz limits. The purpose of the rules in paragraphs (b)(1) through (b)(3) of this section is to reduce the likelihood that interference to television reception from public mobile operations on these channels will occur. The protected TV station locations specified in this section are the locations of record as of September 1974, and these do not change even though the TV stations may have been subsequently relocated.

(1) Co-channel protection. The ERP of control transmitters must not exceed the limits in the tables in paragraphs (b)(1)(ii) and (b)(1)(iii) of this section. The limits depend upon the height above average terrain of the control transmitter antenna and the distance between the control transmitter and the nearest protected TV station location in paragraph (b)(1)(i) of this section.

(i) The protected TV station locations are as follows:

Control Transmitter Frequency Range	Protected TV Station Location		
470-476 MHz	Jacksonville, IL	39°45'52"	90°30'29"
	Mt. Pleasant, MI	43°34'24"	84°46'21"
	Oxford, OH	39°30'26"	84°44'09"
	Washington, DC	38°57'17"	77°00'17"
476-482 MHz	Champaign, IL	40°04'11"	87°54'45"
	Madison, WI	43°03'01"	89°29'15"
	Parkersburg, WV	39°20'50"	81°33'56"
	Fort Wayne, IN	41°05'35"	85°10'42"
	Lancaster, PA	40°15'45"	76°27'49"
482-488 MHz	South Bend, IN	41°36'26"	86°12'48"
488-494 MHz	Philadelphia, PA	40°02'30"	75°14'24"
494-500 MHz	None		
500-506 MHz	Johnstown, PA	40°19'47"	78°53'45"
506-512 MHz	Washington, DC	38°57'49"	77°06'18"
	Waterbury, CT	41°31'02"	73°01'00"

(ii) Table E-3 and E-4 apply to control transmitters in the New York - Northeastern New Jersey and Cleveland urban areas that transmit on channels in the 476-482 MHz range and to control transmitters in the Detroit urban area that transmit on channels in the 482-488 MHz range.

(iii) Tables E-5 and E-6 apply to all control transmitters except those to which Tables E-3 and E-4 apply.

(2) Adjacent channel protection. The ERP of control transmitters must not exceed the limits in Table E-7. The limits depend upon the height above average terrain of the control transmitter antenna and the distance between the control transmitter and the nearest protected TV station location listed in this paragraph. The protected TV station locations are as follows:

Control Transmitter Frequency Range	Protected TV Station Location			TV Channel
470-476 MHz	Hanover, NH	43°42'30"	72°09'16"	(15)
	Madison, WI	43°03'01"	89°29'15"	(15)
	Champaign, IL	40°04'11"	87°54'45"	(15)
	San Diego, CA	32°41'48"	116°56'10"	(15)
	Lancaster, PA	40°15'45"	76°27'49"	(15)
	Parkersburg, WV	39°20'50"	81°33'56"	(15)
476-482 MHz	South Bend, IN	41°36'20"	86°12'44"	(16)
	Pittsburgh, PA	40°26'46"	79°57'51"	(16)
	Mt. Pleasant, MI	43°34'24"	84°46'21"	(14)
	Scranton, PA	41°10'58"	75°52'21"	(16)
482-488 MHz	Hanover, NH	43°42'30"	72°09'16"	(15)
	Fort Wayne, IN	41°05'35"	85°10'42"	(15)
488-494 MHz	Salisbury, MD	38°24'15"	75°34'45"	(16)
494-500 MHz	Philadelphia, PA	40°02'30"	75°14'24"	(17)
500-506 MHz	Washington, DC	38°57'49"	77°06'18"	(20)
506-512 MHz	Harrisburg, PA	40°20'44"	76°52'09"	(21)

Table E-3 - Maximum ERP (Watts) for Control Transmitters (HAAT 152 meters or less)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)									
	15 (50)	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
209 (130)	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
201 (125)	1000	1000	1000	1000	1000	1000	1000	850	750	725
193 (120)	1000	1000	1000	1000	900	750	675	600	550	500
185 (115)	1000	1000	800	725	600	525	475	425	375	350
177 (110)	850	700	600	500	425	375	325	300	275	225
169 (105)	600	475	400	325	275	250	225	200	175	150
161 (100)	400	325	275	225	175	150	140	125	110	100
153 (95)	275	225	175	125	110	95	80	70	60	50
145 (90)	175	125	100	75	50					

See § 22.627(b)(1)(ii). This table is for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

Table E-4 - Maximum ERP (Watts) for Control Transmitters (HAAT more than 152 meters)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)					
	152 (500)	305 (1000)	457 (1500)	610 (2000)	762 (2500)	914 (3000)
209 (130)	1000	447	219	117	71	46
193 (120)	500	209	95	50	30	19
177 (110)	225	91	35	19	11	8
161 (100)	100	30	10	5	3	2
153 (95)	50	13	5	3	2	1

See § 22.627(b)(1)(ii). This table is for antenna heights of more than 152 meters (500 feet) above average terrain. For intermediate values of height and/or distance, use linear interpolation to obtain the maximum permitted ERP.

Table E-5 - Maximum ERP (Watts) for Control Transmitters (HAAT 152 meters or less)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)									
	15 (50)	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
261 (162)	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
257 (160)	1000	1000	1000	1000	1000	1000	1000	1000	1000	800
249 (155)	1000	1000	1000	1000	1000	875	775	700	625	575
241 (150)	1000	1000	950	775	725	625	550	500	450	400
233 (145)	850	750	650	575	500	440	400	350	320	300
225 (140)	600	575	465	400	350	300	275	250	230	225
217 (135)	450	400	335	300	255	240	200	185	165	150
209 (130)	350	300	245	200	185	160	145	125	120	100
201 (125)	225	200	170	150	125	110	100	90	80	75
193 (120)	175	150	125	105	90	80	70	60	55	50

See § 22.627(b)(1)(iii). This table applies for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

Table E-6 - Maximum ERP (Watts) for Control Transmitters (HAAT more than 152 meters)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)					
	152 (500)	305 (1000)	457 (1500)	610 (2000)	762 (2500)	914 (3000)
261 (162)	1000	501	282	170	110	71
241 (150)	400	209	110	60	36	23
225 (140)	225	102	50	28	16	10
209 (130)	100	48	21	11	7	5
193 (120)	50	19	9	5	3	2

See § 22.627(b)(1)(iii). This table is for antenna heights of more than 152 meters (500 feet) above average terrain. For intermediate values of height and/or distance, use linear interpolation to obtain the maximum permitted ERP.

Table E-7 - Maximum ERP (Watts) for Control Transmitters

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)								
	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
108 (67)	1000	1000	1000	1000	1000	1000	1000	1000	1000
106 (66)	1000	1000	1000	1000	1000	1000	1000	1000	750
105 (65)	1000	1000	1000	1000	1000	1000	825	650	600
103 (64)	1000	1000	1000	1000	1000	775	625	500	400
101 (63)	1000	1000	1000	1000	440	400	350	320	300
100 (62)	1000	1000	1000	525	375	250	200	150	125
98 (61)	1000	700	450	250	200	125	100	75	50
97 (60)	1000	425	225	125	100	75	50		

See § 22.627(b)(2). This table applies to control transmitters in the Boston, Chicago, Cleveland, Detroit, Los Angeles, New York - Northeastern New Jersey, Philadelphia, Pittsburgh and Washington, DC urban areas. This table is for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

(c) Los Angeles area. This paragraph applies only to control transmitters in the Los Angeles urban area that utilize an antenna height of 457 or more meters (1500 or more feet) above mean sea level. The ERP of such transmitters must not exceed the following limits:

Antenna height AMSL in meters (feet)	ERP (Watts)
457 (1500) to 610 (2000)	155
611 (2001) to 762 (2500)	100
763 (2501) to 914 (3000)	70
915 (3001) to 1067 (3500)	50
1068 (3501) to 1219 (4000)	40
1220 (4001) to 1372 (4500)	30
1373 (4501) and above	25

470-512 MHZ TRUNKED MOBILE OPERATION

§ 22.651 470-512 MHz channels for trunked mobile operation.

The following channels are allocated for assignment to transmitters providing trunked public mobile service within the specified urban areas. All channels have a bandwidth of 20 Khz and are designated by their center frequencies in MegaHertz.

Houston

488.0125 ..... 491.0125	488.0875 ..... 491.0875
488.0375 ..... 491.0375	488.1125 ..... 491.1125
488.0625 ..... 491.0625	488.1375 ..... 491.1375

New York - Northern New Jersey

473.0125 ..... 479.0125	473.1625 ..... 479.1625
473.0375 ..... 479.0375	473.1875 ..... 479.1875
473.0625 ..... 479.0625	473.2125 ..... 479.2125
473.0875 ..... 479.0875	473.2375 ..... 479.2375
473.1125 ..... 479.1125	473.2625 ..... 479.2625
473.1375 ..... 479.1375	473.2875 ..... 479.2875

§ 22.653 Eligibility.

Only licensees already authorized to provide trunked mobile service or their successors in interest are eligible to apply for additional use of these channels for trunked mobile service, and then only in the urban areas already authorized.

§ 22.655 Channel usage.

The Commission is redesignating the public mobile channels in the 470-512 Mhz range from trunked mobile operation to point-to-multipoint operation as the demand for trunked mobile service decreases.

(a) The licensees in each market shall measure channel usage at least once every 3 months. These measurements shall be reported to the Commission within 30 days. Measurements shall be taken during the busiest 12-hour periods on 3 days (within a 7-day period) having normal usage. The information must be reported separately for each of the 3 days selected, must be reported by dates, and must disclose the following:

(1) the number of mobile units in service during each of the days specified;

(2) the number of calls completed each hour;

(3) the total number of minutes during each hour that the channels were utilized for communications by the mobile units;

(4) the average channel usage for the busiest hour for the 3 days measured; and

(5) any additional information that more accurately reflects channel usage.

(b) If the measured probability of blocking decreases below 25%, the Commission will redesignate channels not needed to maintain blocking at 25% or less. The number of channels needed to maintain blocking below 25% will be determined from the channel usage reports and the Erlang C tables.

(c) Although two or more channels are necessary to provide trunked service, the Commission may, pursuant to this section, reduce to one the number of channels assigned. In such cases, the licensee may provide non-trunked two-way public mobile service on the one remaining channel.

§ 22.657 Transmitter locations.

The purpose of the rules in paragraphs (a) and (b) of this section is to define the areas in which the 470-512 MHz channels are allocated for public mobile use. The purpose of the rules in paragraphs (c) through (f) of this section is to reduce the likelihood that interference to television reception from public mobile operations on these channels will occur. The protected TV station locations specified in paragraphs (d), (e)(1) and (f) of this section are the locations of record as of September 1974, and these do not change even though the TV stations may have been subsequently relocated.

(a) Base transmitter locations. Base transmitter locations must be within 80 kilometers (50 miles) of the designated locations in this paragraph. Mobile transmitters must not be operated at locations more than 129 kilometers (80 miles) from the designated locations in this paragraph.

Urban area	N. Latitude	W. Longitude
Houston, TX	29°45'26"	95°21'37"
New York, NY - NE NJ	40°45'06"	73°59'39"

(b) Mobile area of operation. Mobile transmitters must not be operated at locations more than 48 kilometers (30 miles) from all associated base stations.

(c) Protection from intermodulation interference. Base transmitter locations must be at least 1.6 kilometers (1 mile) from the current main transmitter locations of all TV stations transmitting on TV channels separated by 2, 3, 4, 5, 7, or 8 TV channels from the TV channel containing the frequencies on which the base station will transmit. This requirement is intended to reduce the likelihood of intermodulation interference.

(d) Adjacent channel protection from mobile transmitters. Base transmitter locations must be at least 145 kilometers (90 miles) from the applicable protected TV station locations specified in this paragraph. This requirement is intended to provide a 0 dB mini-

mum desired to undesired signal strength ratio at the Grade B contour of an adjacent channel TV station.

Mobile Transmitter Frequency Range	Protected TV Station Location		TV Channel
470-476 MHz	Lancaster, PA	40°15'45"	76°27'49" (15)
476-482 MHz	Scranton, PA	41°10'58"	75°52'21" (16)

(e) Co-channel protection from mobile transmitters. Base transmitter locations must be at least the distance specified in paragraph (e)(2) of this section from the applicable protected TV station locations specified in paragraph (e)(1) of this section. This requirement is intended to provide a 40 dB minimum desired to undesired signal strength ratio at the Grade B contour of a co-channel TV station.

(1) The protected TV station locations are as follows:

Mobile Transmitter Frequency Range	Protected TV Station Location		
470-476 MHz	Washington, DC	38°57'17"	77°00'17"
476-482 MHz	Lancaster, PA	40°15'45"	76°27'49"

(2) The required minimum distance depends upon the effective radiated power (ERP) of the most powerful mobile transmitter(s) in the system:

Mobile unit ERP	Minimum distance	
60 watts	193 kilometers	(120 miles)
50	185	(115)
25	177	(110)
10	169	(105)
5	161	(100)

(f) Co-channel protection from base transmitters with high antennas. This paragraph applies only to base transmitter locations in the New York - Northeastern New Jersey urban area that utilize an antenna height of more than 152 meters (500 feet) above average terrain. The distance between the location of such a base transmitter and the applicable protected TV station location specified in this paragraph must equal or exceed the sum of the distance from the base transmitter location to the radio horizon in the direction of the specified location and 89 kilometers (55 miles - representing the distance from the main transmitter location of the TV station to its Grade B contour in the direction of the base transmitter). The distance to the radio horizon is calculated as follows:

$$d = \sqrt{17 \times h}$$

where d is the distance to the radio horizon in kilometers
h is the height of the antenna center of radiation above ground level in meters

Base Transmitter Frequency Range	Protected TV Station Location		
470-476 MHz	Washington, DC	38°57'17"	77°00'17"
476-482 MHz	Lancaster, PA	40°15'45"	76°27'49"

(g) The Commission may waive specific distance separation requirements of paragraphs (d) through (f) of this section if the applicant submits an engineering analysis which demonstrates that terrain effects and/or operation with less effective radiated power would satisfy the applicable minimum desired to undesired signal strength ratios at the Grade B contours of the protected TV stations.

Table E-8 - Maximum ERP (Watts) for Base Transmitters (HAAT 152 meters or less)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)									
	15 (50)	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
209 (130)	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
201 (125)	1000	1000	1000	1000	1000	1000	1000	850	750	725
193 (120)	1000	1000	1000	1000	900	750	675	600	550	500
185 (115)	1000	1000	800	725	600	525	475	425	375	350
177 (110)	850	700	600	500	425	375	325	300	275	225
169 (105)	600	475	400	325	275	250	225	200	175	150
161 (100)	400	325	275	225	175	150	140	125	110	100
153 (95)	275	225	175	125	110	95	80	70	60	50
145 (90)	175	125	100	75	50					

See § 22.659(b)(2). This table is for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

Table E-9 - Maximum ERP (Watts) for Base Transmitters (HAAT more than 152 meters)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)					
	152 (500)	305 (1000)	457 (1500)	610 (2000)	762 (2500)	914 (3000)
209 (130)	1000	447	219	117	71	46
193 (120)	500	209	95	50	30	19
177 (110)	225	91	35	19	11	8
161 (100)	100	30	10	5	3	2
153 (95)	50	13	5	3	2	1

See § 22.659(b)(2). This table is for antenna heights of more than 152 meters (500 feet) above average terrain. For intermediate values of height and/or distance, use linear interpolation to obtain the maximum permitted ERP.

For this purpose, the Grade B contour of a TV station is deemed to be a circle with a 89 kilometer (55 mile) radius, centered on the protected TV station location, and along which the median TV signal field strength is 64 dBμV/m. In any showing intended to demonstrate compliance with the minimum desired to undesired signal ratio requirements of this section, all predicted field strengths must have been determined using the UHF TV propagation curves contained in Part 73 of this chapter.

§ 22.659 Effective radiated power limits.

The purpose of the rules in this section, which limit effective radiated power (ERP), is to reduce the likelihood that interference to television reception from public mobile operations on these channels will occur. The protected TV station locations specified in this section are the locations of record as of September 1974, and these do not change even though the TV stations may have been

Table E-10 - Maximum ERP (Watts) for Base Transmitters (HAAT 152 meters or less)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)									
	15 (50)	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
261 (162)	1000	1000	1000	1000	1000	1000	1000	1000	1000	1000
257 (160)	1000	1000	1000	1000	1000	1000	1000	1000	1000	800
249 (155)	1000	1000	1000	1000	1000	875	775	700	625	575
241 (150)	1000	1000	950	775	725	625	550	500	450	400
233 (145)	850	750	650	575	500	440	400	350	320	300
225 (140)	600	575	465	400	350	300	275	250	230	225
217 (135)	450	400	335	300	255	240	200	185	165	150
209 (130)	350	300	245	200	185	160	145	125	120	100
201 (125)	225	200	170	150	125	110	100	90	80	75
193 (120)	175	150	125	105	90	80	70	60	55	50

See § 22.659(b)(3). This table applies for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

Table E-11 - Maximum ERP (Watts) for Base Transmitters (HAAT more than 152 meters)

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)					
	152 (500)	305 (1000)	457 (1500)	610 (2000)	762 (2500)	914 (3000)
261 (162)	1000	501	282	170	110	71
241 (150)	400	209	110	60	36	23
225 (140)	225	102	50	28	16	10
209 (130)	100	48	21	11	7	5
193 (120)	50	19	9	5	3	2

See § 22.659(b)(3). This table is for antenna heights of more than 152 meters (500 feet) above average terrain. For intermediate values of height and/or distance, use linear interpolation to obtain the maximum permitted ERP.

subsequently relocated.

(a) Maximum ERP. The ERP of base transmitters must not exceed 1000 Watts under any circumstances. The ERP of mobile transmitters must not exceed 60 Watts under any circumstances.

(b) Co-channel protection from base transmitters. The ERP of base transmitters in the New York - Northeastern New Jersey urban area must not exceed the limits in the tables in paragraphs (b)(2) and (b)(3) of this section. The limits depend upon the height above average terrain of the base transmitter antenna and the distance between the base transmitter and the nearest protected TV station location in paragraph (b)(1) of this section.

(1) The protected TV station locations are as follows:

Base Transmitter Frequency Range	Protected TV Station Location		
470-476 MHz	Washington, DC	38°57'17"	77°00'17"
476-482 MHz	Lancaster, PA	40°15'45"	76°27'49"

(2) Tables E-8 and E-9 apply to base transmitters in the New York - Northeastern New Jersey urban area that transmit on

Table E-12 - Maximum ERP (Watts) for Base Transmitters

Distance to Protected TV Station in kilometers (miles)	Antenna Height Above Average Terrain in meters (feet)								
	30 (100)	46 (150)	61 (200)	76 (250)	91 (300)	107 (350)	122 (400)	137 (450)	152 (500)
108 (67)	1000	1000	1000	1000	1000	1000	1000	1000	1000
106 (66)	1000	1000	1000	1000	1000	1000	1000	1000	750
105 (65)	1000	1000	1000	1000	1000	1000	825	650	600
103 (64)	1000	1000	1000	1000	1000	775	625	500	400
101 (63)	1000	1000	1000	1000	440	400	350	320	300
100 (62)	1000	1000	1000	525	375	250	200	150	125
98 (61)	1000	700	450	250	200	125	100	75	50
97 (60)	1000	425	225	125	100	75	50		

See § 22.659(c)(2). This table applies to base transmitters in the New York - Northeastern New Jersey urban areas. This table is for antenna heights of 152 meters (500 feet) or less above average terrain. For antenna heights between those in the table, use the next higher antenna height. For distances between those in the table, use the next lower distance.

channels in the 476-482 MHz range.

(3) Tables E-10 and E-11 apply to base transmitters in the New York - Northeastern New Jersey urban area that transmit on channels in the 470-476 MHz range.

(c) Adjacent channel protection from base transmitters. The ERP of base transmitters must not exceed the limits in Table E-12. The limits depend upon the height above average terrain of the base transmitter antenna and the distance between the base transmitter and the nearest protected TV station location specified in paragraph (c)(1) of this section.

(1) The protected TV station locations are as follows:

Base Transmitter Frequency Range	Protected TV Station Location			TV Channel
470-476 MHz	Hanover, NH	43°42'30"	72°09'16"	(15)
	Lancaster, PA	40°15'45"	76°27'49"	(15)
476-482 MHz	Scranton, PA	41°10'58"	75°52'21"	(16)
482-488 MHz	Hanover, NH	43°42'30"	72°09'16"	(15)

(2) Table E-12 applies to base transmitters in the New York - Northeastern New Jersey urban area.

Subpart F - Rural Radiotelephone Service

§ 22.701 Scope.

The rules in this subpart govern the licensing and operation of stations and systems in the Rural Radiotelephone Service. The licensing and operation of these stations and systems is also subject to rules elsewhere in this part that apply generally to the Public Mobile Services. However, in case of conflict, the rules in this subpart govern.

§ 22.702 Eligibility.

Existing and proposed communications common carriers are eligible to apply for authorizations to operate central office, interoffice and rural subscriber stations in the Rural Radiotelephone Service. Subscribers are eligible to apply for authorizations to operate rural subscriber stations in the Rural Radiotelephone Service.

§ 22.703 Separate rural subscriber station authorization not required.

A separate authorization is not required for rural subscriber stations for which the effective radiated power does not exceed 60 Watts and for which FAA notification of construction or alteration of the antenna structure is not required (see criteria in § 17.7 of this chapter). Authority to operate such rural subscriber stations is conferred by the authorization of the central office or base station from which they receive service.

§ 22.705 Rural radiotelephone system configuration.

Stations in the Rural Radiotelephone Service are authorized to communicate as follows:

(a) Rural subscriber stations are authorized to communicate with and through the central office station(s) with which they are associated. However, where the establishment of a central office station in this service is not feasible, rural subscriber stations may be authorized to communicate with and through a base station in the Paging and Radiotelephone Service.

(b) Central office stations may communicate only with rural subscriber stations.

(c) Interoffice stations may communicate only with other interoffice stations.

§ 22.709 Rural radiotelephone application requirements.

In addition to information required by Subparts B and D of this part, applications for authorization to operate a station in the Rural Radio Service must contain the applicable supplementary information described in this section.

(a) Interoffice stations. Applications for authority to operate a new interoffice station or to add transmitters or points of communications to an existing interoffice station must contain an exhibit demonstrating that the requested facilities would be used only for interconnecting central office stations and explaining why the use of alternative existing radio or wire facilities is not feasible.

(b) Technical information required. For each transmitter in the Rural Radiotelephone Service, the following information is required by FCC Form 401 Schedule B:

(1) Location description; city; county; state; geographical coordinates correct to ±1 second, site elevation above mean sea level;

(2) Antenna manufacturer and type, antenna height to tip above ground level, the height of the center of radiation of the antenna above the average terrain, the height of the antenna center of radiation above the average elevation of the terrain along each of the 8 cardinal radials, antenna gain in the maximum lobe, one to four azimuthal directions of maximum antenna gain, if any, including the azimuth of the maximum lobe of the antenna, a polar plot of the horizontal gain pattern of the antenna, the electric field polarization of the wave emitted by the antenna when installed as proposed;

(3) The center frequency of each channel requested, the maximum effective radiated power, the effective radiated power in each of the cardinal radial directions, the emission types to be used, including bandwidth, the station classification (e.g. base, fixed, mobile);

(c) No landline facilities. Each application must contain an exhibit showing that it is impracticable to provide the required communication service by means of landline facilities.

(d) Interference exhibit. Applications for central office, interoffice and relay stations must include an exhibit identifying co-channel facilities and demonstrating that the proposed station, if authorized, would not cause interference to the service of those co-channel facilities. This exhibit must:

(1) for UHF channels, identify each authorized transmitter located within 108 kilometers (67 miles) of the proposed transmitter in directions in which the distance to the interfering contour is 76.4

kilometers (47.5 miles) or less, and within 178 kilometers (111 miles) of the proposed transmitter in directions in which the distance to the interfering contour exceeds 76.4 kilometers (47.5 miles).

(2) for VHF channels, identify each authorized transmitter located within 135 kilometers (84 miles) of the proposed transmitter in directions in which the distance to the interfering contour is 93.3 kilometers (58 miles) or less, and within 178 kilometers (111 miles) of the proposed transmitter in directions in which the distance to the interfering contour exceeds 93.3 kilometers (58 miles).

(3) for each authorized transmitter identified, show the results of distance calculations indicating that there would be no overlap of service and interfering contours, or alternatively, indicate that the licensee of or applicant for the protected transmitter and/or the applicant, as required, have agreed in writing to accept any interference resulting from operation of the proposed transmitter.

§ 22.711 Provision of information to applicants.

Licensees in the Rural Radio Service must, upon request by a bona-fide prospective applicant, provide to such applicant the information required by § 22.709 regarding the portion of the licensee's operations that potentially could affect, or be affected by, the prospective applicant's proposed station, if such information is not already on file with the Commission. This information must be provided to the bona-fide prospective applicant within 30 days of receipt of the information request.

§ 22.713 Construction period for rural radiotelephone stations.

The construction period for stations in the Rural Radiotelephone Service is 12 months.

§ 22.715 Technical channel assignment criteria for rural radiotelephone stations.

Channels are assigned in the Rural Radiotelephone Service using the procedures in § 22.567 to develop service and interfering contours.

§ 22.717 Procedure for mutually exclusive applications in the Rural Radiotelephone Service.

Mutually exclusive applications in the Rural Radiotelephone Service and the Paging and Radiotelephone Service are processed in accordance with the rules set forth in § 22.509 of this part.

CONVENTIONAL RURAL RADIO STATIONS

§ 22.725 Channels for conventional rural radiotelephone stations.

The following channels are allocated for paired assignment to transmitters that provide conventional rural radiotelephone service. These channels may be assigned for use by central office or rural subscriber stations as indicated, and interoffice stations. These channels may be assigned also for use by relay stations in systems where it would be impractical to provide rural radiotelephone service without the use of relay stations. All channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

VHF channels

central office	rural subscriber	central office	rural subscriber
152.03	158.49	152.57	157.83
152.06	158.52	152.60	157.86
152.09	158.55	152.63	157.89
152.12	158.58	152.66	157.92
152.15	158.61	152.69	157.95
152.18	158.64	152.72	157.98
152.21	158.67	152.75	158.01
152.51	157.77	152.78	158.04
152.54	157.80	152.81	158.07

UHF channels

454.025	459.025	454.350	459.350
454.050	459.050	454.375	459.375
454.075	459.075	454.400	459.400
454.100	459.100	454.425	459.425
454.125	459.125	454.450	459.450
454.150	459.150	454.475	459.475
454.175	459.175	454.500	459.500
454.200	459.200	454.525	459.525
454.225	459.225	454.550	459.550
454.250	459.250	454.575	459.575
454.275	459.275	454.600	459.600
454.300	459.300	454.625	459.625
454.325	459.325	454.650	459.650

(a) The channels listed in this section are also allocated for assignment in the Paging and Radiotelephone Service.

(b) In Puerto Rico and the Virgin Islands, channels in the 154.04-154.46 MHz and 161.40-161.85 MHz frequency ranges may be assigned to transmitters providing rural radiotelephone service; these ranges are also allocated for assignment in the International Fixed Public and Aeronautical Fixed radio services.

(c) In Alaska, channels 42.40, 44.10, 44.20 and 45.90 MHz are allocated for assignment to transmitters providing rural radiotelephone service using meteor burst propagation modes, subject to the provisions of § 22.719.

§ 22.729 Meteor burst propagation modes.

The rules in this section govern stations in this service that use meteor burst propagation modes to provide rural radiotelephone service in Alaska.

(a) Channel assignments. The channels 42.40 and 44.10 MHz may be assigned to central office stations and rural subscriber stations, respectively, on a primary basis. The channels 44.20 and 45.90 MHz may be assigned to central office and rural subscriber stations, respectively, on a secondary basis to Private Radio services stations using meteor burst propagation modes.

(b) Transmitting power. The transmitter output power must not exceed 2000 Watts for central office stations and 500 Watts for rural subscriber stations.

(c) Station locations. Co-channel central office stations of different licensees must be at least 241 kilometers (150 miles) apart.

A rural subscriber station and a central office station of different licensees must be at least 241 kilometers (150 miles) apart if the rural subscriber stations of the different licensees operate on the same channel. The Commission may waive the requirements of this paragraph if the affected users agree to a cooperative sharing arrangement.

(d) Emission type. Only type F1D emission is authorized.

(e) Bandwidth. The authorized bandwidth is 20 kHz.

(f) Station identification. Station identification is required only for the central office station.

(g) Interference. Stations authorized under the provisions of this section must not cause harmful interference to the service of stations in other radio services.

(h) Developmental authorization. Meteor burst communications systems may be authorized under developmental authorizations pursuant to § 22.419.

§ 22.731 Emission limitations.

Upon application for multichannel operation, the Commission may authorize emission bandwidths wider than those specified in § 22.357, provided that spectrum utilization is equal to or better than that achieved by single channel operation.

§ 22.733 Priority of service.

Within the Rural Radiotelephone Service, the channels listed in § 22.725 are intended primarily for use in rendition of public message service between rural subscriber and central office stations and to provide radio trunking facilities between central offices. However, the channels may also be used for the rendition of private leased-line communication service provided that such usage would not reduce or impair the extent or quality of communication service which would be available, in the absence of private leased-line service, to the general public receiving or subsequently requesting public message service from a central office.

§ 22.737 Temporary fixed stations.

The Commission may, upon proper application therefor, authorize the construction and operation of temporary fixed stations. Temporary fixed stations are to be used as rural subscriber, interoffice, or central office stations when those stations are unavailable or when service from those stations is disrupted by storms or emergencies.

(a) Six month limitation. If it is necessary for a temporary fixed station to remain at the same location for more than six months, the licensee of that station must apply for authorization to operate the station at the specific location at least 30 days before the end of the six month period.

(b) International communications. Communications between the United States and Canada or Mexico must not be carried out using a temporary fixed station without prior authorization from the Commission. Licensees desiring to carry out such communications should apply sufficiently in advance to allow for the time necessary to coordinate with Canada or Mexico.

BASIC EXCHANGE TELEPHONE RADIO SYSTEMS

§ 22.757 Channels for basic exchange telephone radio systems.

The channels listed in § 22.725 are also allocated for paired assignment to transmitters in basic exchange telephone radio systems. In addition, the following channels are allocated for paired assignment to transmitters in basic exchange telephone radio systems. All channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

UHF channels - shared with Private Radio Services

rural subscriber	central office	rural subscriber	central office
816.2375	861.2375	816.1125	861.1125
817.2375	862.2375	817.1125	862.1125
818.2375	863.2375	818.1125	863.1125
819.2375	864.2375	819.1125	864.1125
820.2375	865.2375	820.1125	865.1125
816.2125	861.2125	816.0875	861.0875
817.2125	862.2125	817.0875	862.0875
818.2125	863.2125	818.0875	863.0875
819.2125	864.2125	819.0875	864.0875
820.2125	865.2125	820.0875	865.0875
816.1875	861.1875	816.0625	861.0625
817.1875	862.1875	817.0625	862.0625
818.1875	863.1875	818.0625	863.0625
819.1875	864.1875	819.0625	864.0625
820.1875	865.1875	820.0625	865.0625
816.1625	861.1625	816.0375	861.0375
817.1625	862.1625	817.0375	862.0375
818.1625	863.1625	818.0375	863.0375
819.1625	864.1625	819.0375	864.0375
820.1625	865.1625	820.0375	865.0375
816.1375	861.1375	816.0125	861.0125
817.1375	862.1375	817.0125	862.0125
818.1375	863.1375	818.0125	863.0125
819.1375	864.1375	819.0125	864.0125
820.1375	865.1375	820.0125	865.0125

(a) Channels are assigned in groups, as listed in this section.

(b) Channel groups in the 816-865 Mhz frequency range are not assigned to Rural Radio Service stations located:

(1) within 161 kilometers (100 miles) of the borders of the largest 54 MSAs (see § 22.909).

(2) north of Line A or east of Line C; or,

(3) within 110 kilometers (68 miles) of the Mexican border.

(c) Channel groups in the 816-865 Mhz frequency range are not assigned to central office stations located within 113 kilometers (70 miles) of another station authorized to operate on the same channels or on channels with center frequencies offset by 12.5 kHz.

(d) Technical parameters governing the use of these channels are contained in Subpart S of Part 90 of this chapter.

(e) The Common Carrier Bureau coordinates the availability of channels in the 816-865 MHz frequency range with the Private Radio Bureau.

Subpart G - Air-ground Radiotelephone Service

§ 22.801 Scope.

The rules in this subpart govern the licensing and operation of public air-ground radiotelephone stations and systems. The licensing and operation of these stations and systems is also subject to rules elsewhere in this part that apply generally to the Public Mobile services. However, in case of conflict, the rules in this subpart govern.

§ 22.803 Procedure for mutually exclusive ground station applications.

Mutually exclusive applications for ground stations will be processed in accordance with the procedures set forth in § 22.509, except that, in the case of mutually exclusive applications filed on the same day, the Commission may seek to resolve the mutual exclusivity through a settlement conference pursuant to § 22.135 prior to conducting a random selection process.

GENERAL AVIATION AIR-GROUND STATIONS

§ 22.805 Channels for general aviation air-ground service.

The following channels are allocated for the provision of radiotelephone service to airborne mobile subscribers in general aviation (non-commercial) aircraft. These channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

Signalling channel pair

ground	airborne mobile
454.675	459.675

Communication channel pairs

ground	airborne mobile	ground	airborne mobile
454.700	459.700	454.850	459.850
454.725	459.725	454.875	459.875
454.750	459.750	454.900	459.900
454.775	459.775	454.925	459.925
454.800	459.800	454.950	459.950
454.825	459.825	454.975	459.975

(a) Channel 454.675 MHz is assigned to each and every ground station, to be used only for automatically alerting airborne mobile stations of incoming calls.

(b) All airborne mobile channels are assigned for use by each and every airborne mobile station.

§ 22.809 Transmitting power limits.

The transmitting power of ground and airborne mobile transmitters operating on the channels listed in § 22.805 must not exceed the limits in this section.

(a) Ground station transmitters. The effective radiated power of ground stations must not exceed 100 Watts and must not be less than 50 Watts.

(b) Airborne mobile transmitters. The transmitter power output of airborne mobile transmitters must not exceed 25 Watts and must not be less than 4 Watts.

§ 22.811 Idle tone.

Whenever a ground station transmitter authorized to transmit on any of the communications channels listed in § 22.805 is available for service but is not providing service, a modulated signal must be continuously transmitted on the communication channel assigned to that transmitter. While this modulated signal is transmitted, the transmitter power must be between 10 and 20 dB lower than the normal transmitting power.

§ 22.813 Technical assignment criteria.

The rules in this section establish technical assignment criteria for the channels listed in § 22.805. These criteria are intended to provide substantial service volumes over areas that have significant local and regional general aviation activity, while maintaining the continuous nationwide in-route coverage of the original geographical layout.

(a) Distance separation for co-channel ground stations. The Commission may grant an application requesting assignment of a communication channel to a proposed ground transmitter only if the proposed antenna location is at least 800 kilometers (497 miles) from the antenna location of the nearest co-channel ground transmitter in the United States, its territories and possessions; and 1000 kilometers (621 miles) from the antenna location of the nearest co-channel ground transmitter in Canada.

(b) Dispersion. The Commission may grant an application requesting assignment of a communication channel to a proposed ground transmitter only if there are no more than five different communication channels already assigned to ground transmitters with antenna locations within a 320 kilometer (199 mile) radius of the proposed antenna location.

§ 22.815 Construction period for general aviation ground stations.

The construction period (see § 22.142) for general aviation ground stations is 12 months.

§ 22.817 Additional channel policies.

The rules in this section govern the processing of applications for authority to operate a ground station transmitter on any ground station communication channel listed in § 22.805 when the applicant has applied or been granted an authorization for other ground station communication channels in the same area. The general policy of the Commission is to assign one ground station communication channel in an area to a carrier per application cycle, up to a maximum of six ground station communication channels per area. That is, a carrier must apply for one ground station communication

channel, receive the authorization, construct the station, and notify the Commission of commencement of service before applying for an additional ground station communication channel in that area.

(a) Air-ground transmitters in same area. Any transmitter on any of the ground station channels listed in § 22.805 is considered to be in the same area as another transmitter on any ground station channel listed in § 22.805 if it is located less than 350 kilometers (217 miles) from that transmitter.

(b) Initial channel. The Commission will not assign more than one ground station communication channel for new ground stations. Ground stations are considered to be new if there are no authorized ground station transmitters on any channel listed in § 22.805 controlled by the applicant in the same area.

(c) Additional channel. Applications for ground transmitters to be located in the same area as an authorized ground station controlled by the applicant, but to operate on a different ground station communication channel, are considered as requesting an additional channel for the authorized station.

(d) Amendment of pending application. If the Commission receives and accepts for filing an application for a ground station transmitter to be located in the same area as a ground station transmitter proposed in a pending application previously filed by the applicant, but on a different ground station communication channel, the subsequent application is treated as a major amendment to change the technical proposal of the prior application. The filing date of any application so amended is the date the Commission received the subsequent application.

(e) Dismissal of premature applications for additional channel. If the Commission receives an application requesting an additional ground station communication channel for an authorized ground station prior to receiving notification that the station is providing service to the public on the authorized channel(s), the Commission may dismiss that application without prejudice.

(f) Dismissal of applications for seventh channel. If the Commission receives an application requesting an additional ground station communication channel for an authorized ground station which would, if granted, result in that station being assigned more than six ground station communication channels in the same area, the Commission may dismiss that application without prejudice.

§ 22.819 AGRAS compatibility requirement.

Except as provided in paragraph (a) of this section, stations transmitting on the channels listed in § 22.805 must operate in compliance with the technical and operational requirements contained in the document, "Technical Reference, Air-ground Radiotelephone Automated Service (AGRAS), System Operation and Equipment Characteristics", dated April 12, 1985.

(a) Until January 1, 1994, stations may continue to operate in compliance with the previous standard adopted in Docket 16073.

(b) Copies of the document referenced in this section may be obtained from the Commission's copying contractor.

§ 22.821 Authorization for airborne mobile stations.

An authorization separate from any ground station authorization is required for each airborne mobile station that operates on the channels listed in § 22.805. The operator of the airborne mobile station must apply for the authorization (FCC Form 409). The application must contain an affirmative representation that the applicant has made definite arrangements with a wireline common carrier for service and billing.

COMMERCIAL AVIATION AIR-GROUND SYSTEMS

§ 22.857 Channel plan for commercial aviation air-ground systems.

The 849-851 and 894-896 MHz frequency ranges are allocated for block assignment to nationwide air-ground systems providing radiotelephone service to passengers aboard commercial aircraft. Ground stations transmit on channels in the 849-851 MHz range. Airborne mobile stations transmit on channels in the 894-896 MHz range. Systems using these channels must conform to the channel plan described in this section.

(a) Channel blocks. The spectrum allocated for commercial aviation air-ground systems is divided into ten channel blocks, numbered 1 through 10. All ground stations in each geographical area must use the same channel block for communication with airborne mobile stations in flight, in accordance with § 22.859.

(1) Each channel block is subdivided into 6 control channels labeled P-1 through P-6, and 29 communications channels labeled C-1 through C-29.

(2) The authorized channel bandwidths are as follows:

(i) Each control channel has a bandwidth of 3.2 kHz.

(ii) Each communications channel has a bandwidth of 6 kHz.

(b) The center frequencies (in MegaHertz) of the communications and control channels are listed in Tables G-1 and G-2.

§ 22.859 Geographical channel block layout.

Except as provided in paragraphs (a) and (b) of this section, ground station locations must be within 1.6 kilometers (one mile) of the locations listed in this paragraph. The channel block allotted for each location must be used to provide service to airborne mobile stations in flight and may be used to provide service to airborne mobile stations on ground.

Location	N. Latitude	W. Longitude	Channel Block
ALASKA			
Anchorage	61°11'06"	149°54'42"	8
Cordova	60°33'00"	145°43'00"	5
Ketchikan	55°21'20"	131°42'33"	5
Juneau	58°21'18"	134°34'30"	4
Sitka	57°03'30"	135°22'01"	7
Yakutat	59°30'30"	142°30'00"	8
ALABAMA			
Birmingham	33°23'24"	86°39'59"	2
ARIZONA			
Phoenix	33°35'39"	112°05'12"	4
Winslow	35°01'17"	110°43'02"	6

ARKANSAS			
Pine Bluff	34°10'56"	91°56'18"	8
CALIFORNIA			
Blythe	33°36'39"	114°42'24"	10
Eureka	40°42'59"	124°12'09"	8
Los Angeles	33°56'45"	118°23'03"	4
Oakland	37°51'12"	122°12'30"	1
San Francisco	37°41'15"	122°26'01"	6
Visalia	36°19'36"	119°23'22"	7
COLORADO			
Colorado Springs	38°44'39"	104°51'46"	8
Denver	39°46'45"	104°50'49"	1
Hayden	40°29'04"	107°13'08"	6
FLORIDA			
Miami	25°48'27"	80°16'30"	4
Orlando	28°26'53"	81°22'00"	2
Tallahassee	30°24'02"	84°21'18"	7
GEORGIA			
Atlanta	33°39'05"	84°25'54"	8
St. Simons Island	31°09'22"	81°23'14"	6
HAWAII			
Mauna Kapu	21°24'24"	158°06'02"	5
IDAHO			
Blackfoot	43°11'34"	112°20'57"	8
Caldwell	43°38'45"	116°38'44"	10
ILLINOIS			
Chicago	41°46'49"	87°45'20"	3
Kewanee	41°12'05"	89°57'33"	5
Schiller Park	41°57'18"	87°52'57"	2
INDIANA			
Fort Wayne	40°59'16"	85°11'31"	7
IOWA			
Des Moines	41°31'58"	93°38'54"	1
KANSAS			
Garden City	37°59'35"	100°54'04"	3
Wichita	37°37'24"	97°27'15"	7
KENTUCKY			
Fairdale	38°04'48"	85°47'33"	6
LOUISIANA			
Kenner	30°00'44"	90°13'30"	3
Shreveport	32°27'09"	93°49'38"	5
MASSACHUSETTS			
Boston	42°23'15"	71°01'03"	7
MICHIGAN			
Bellville	42°12'17"	83°29'09"	8
Flint	42°58'21"	83°44'22"	9
Sault Saint Marie	46°28'45"	84°21'31"	6
MINNESOTA			
Bloomington	44°51'30"	93°13'19"	9
MISSISSIPPI			
Meridian	32°19'10"	88°41'33"	9
MISSOURI			
Kansas City	39°18'37"	94°41'07"	6
St. Louis	38°42'45"	90°19'19"	4
Springfield	37°14'28"	93°22'54"	9
MONTANA			
Lewistown	47°02'56"	109°27'27"	5
Miles City	46°25'30"	105°52'30"	8
Missoula	47°01'05"	114°00'41"	3
NEBRASKA			
Grand Island	40°58'00"	98°19'11"	2
Ogallala	41°07'11"	101°45'37"	4
NEVADA			
Las Vegas	36°05'35"	115°10'25"	1
Reno	39°35'13"	119°55'52"	3
Tonopah	38°04'21"	117°13'15"	9
Winnemucca	41°00'39"	117°45'58"	4
NEW MEXICO			
Alamogordo	32°54'46"	105°56'41"	8
Albuquerque	35°03'05"	106°37'13"	10
Aztec	36°48'42"	107°53'48"	9
Clayton	36°27'29"	103°11'16"	5
NEW JERSEY			
Woodbury	39°50'01"	75°09'21"	3
NEW YORK			
E. Elmhurst	40°46'21"	73°52'42"	1
Schuyler	43°09'09"	75°07'50"	2
Staten Island	40°36'05"	74°06'35"	9
NORTH CAROLINA			
Greensboro	36°05'54"	79°56'42"	9
Wilmington	34°16'10"	77°54'24"	7
NORTH DAKOTA			
Dickinson	46°51'05"	102°47'35"	7
OHIO			
Pataskala	40°04'38"	82°41'57"	1
OKLAHOMA			
Warner	35°29'31"	95°18'25"	4
Woodward	36°24'42"	99°28'50"	9
OREGON			
Albany	44°38'24"	123°03'36"	5
Klamath Falls	42°06'30"	121°38'00"	2
Pendleton	45°35'45"	118°31'02"	7
PENNSYLVANIA			
Coraopolis	40°30'33"	80°13'27"	4
New Cumberland	40°11'30"	76°52'02"	8
SOUTH CAROLINA			
Charleston	32°54'10"	80°01'20"	4

SOUTH DAKOTA			
Aberdeen	45°27'21"	98°25'26"	6
Rapid City	44°02'36"	103°03'36"	5
TENNESSEE			
Elizabethton	36°26'04"	82°08'06"	7
Memphis	35°01'44"	89°56'15"	10
Nashville	36°08'44"	86°41'31"	3
TEXAS			
Austin	30°16'37"	97°49'34"	2
Bedford	32°50'19"	97°08'03"	1
Houston	29°54'37"	95°24'39"	9
Lubbock	33°37'06"	101°52'14"	7
Monahans	31°34'58"	102°54'18"	6
UTAH			
Abajo Peak	37°50'21"	109°27'42"	7
Delta	39°23'15"	112°30'44"	2
Escalante	37°45'19"	111°52'27"	5
Green River	38°57'54"	110°13'40"	3
Salt Lake City	40°39'11"	112°12'06"	1
VIRGINIA			
Arlington	38°52'55"	77°06'18"	6
WASHINGTON			
Seattle	47°26'08"	122°17'35"	4
Cheney	47°33'14"	117°43'35"	1
WEST VIRGINIA			
Charleston	38°19'47"	81°39'36"	2
WISCONSIN			
Stevens Point	44°33'06"	89°25'27"	8
WYOMING			
Riverton	43°03'37"	108°27'23"	9

(a) Carriers authorized to construct and operate air-ground radiotelephone systems on the channels listed in § 22.857 may also construct and operate low power ground stations designed to provide service to airborne mobile stations on the ground, provided that no interference is caused to service provided by ground stations located in accordance with the geographical channel block layout or with paragraph (b) of this section. The antenna location of each such low power ground station may be anywhere that is at least 483 kilometers (300 miles) from all antenna locations of ground stations using the same channel block(s) in accordance with the geographical channel block layout or with paragraph (b) of this section.

(b) Ground station locations may be more than 1.6 kilometers (one mile) from all of the locations listed in this section, provided that they are at least 885 kilometers (550 miles) from all antenna locations of ground stations using the same channel block(s) in accordance with the geographical channel block layout or with this paragraph.

§ 22.861 Emission limitations.

Any appropriate emission type may be used to provide air-ground radiotelephone service on the channels listed in § 22.857, provided that the emission limitations of this section are met.

(a) Emission mask. The emission mask described in this paragraph applies instead of those in § 22.359. The power of any emission in each of the adjacent channels must be at least 30 decibels below the power of the total emission. The power of any emission in any of the channels other than the one being used and the adjacent channels must be at least 50 decibels below the power of the total emission.

(b) Airborne mobile transmitters. The power of any emission in each of the adjacent channels must not exceed -130 dBm at any ground station receiver, assuming a 0 dBi receive antenna. The power of any emission in any of the channels other than the one being used and the adjacent channels must not exceed -148 dBm at any ground station receiver, assuming a 0 dBi receive antenna.

(c) Ground station transmitters. The effective radiated power (ERP) of any emission outside of the frequency ranges set forth in § 22.857 must not exceed -10 dBm. The ERP of any emission in each of the adjacent channels must not exceed +10 dBm. The ERP of any emission in any of the channels other than the one being used and the adjacent channels must not exceed -5 dBm.

(d) If an emission on any frequency outside of the authorized bandwidth causes harmful interference, the Commission may require greater attenuation of that emission than required in paragraph (a) of this section.

§ 22.863 Transmitter frequency tolerance.

Ground station transmitter frequencies must be maintained within 10 parts per million (ppm) of the channel reference or center frequencies. Doppler shift correction must be used to ensure that the frequencies of the signals of airborne mobile stations received at ground stations remain within 10 ppm of the channel reference or center frequencies.

§ 22.865 Automatic channel selection procedures.

Operation of stations using the channels listed in § 22.857 must be in accordance with the procedures in this section.

(a) A communications channel is not available for use by a ground station if it is already in use by another ground station at the same location. Ground station equipment must automatically determine whether channels are in use by other ground stations at the same location, and may employ radio frequency signal monitoring to do so. For example, a communications channel may be determined to be in use if the received signal power on that channel at the ground station exceeds -115 dBm, which, assuming a 0 dB gain 895 MHz receive antenna, corresponds to a field strength of approximately 19 dBμV/m. Ground stations may employ an alternative method of determining whether a communications channel is in use provided that such procedure is at least as reliable as radio frequency signal monitoring.

(b) Data indicating which communications channels are available for use are transmitted by ground stations on the assigned control channels.

(c) A call is originated when an airborne mobile station selects a communications channel based on the received data from ground stations and other factors, and transmits an identification code (which identifies the specific ground station from which service is requested) on the selected communications channel. The ground station from which service has been requested may then obtain any necessary billing information and complete the call.

Table G-1 - Ground Station Channels

	CHANNEL BLOCK									
	10	9	8	7	6	5	4	3	2	1
C-1	849.0055	849.2055	849.4055	849.6055	849.8055	850.0055	850.2055	850.4055	850.6055	850.8055
C-2	849.0115	849.2115	849.4115	849.6115	849.8115	850.0115	850.2115	850.4115	850.6115	850.8115
C-3	849.0175	849.2175	849.4175	849.6175	849.8175	850.0175	850.2175	850.4175	850.6175	850.8175
C-4	849.0235	849.2235	849.4235	849.6235	849.8235	850.0235	850.2235	850.4235	850.6235	850.8235
C-5	849.0295	849.2295	849.4295	849.6295	849.8295	850.0295	850.2295	850.4295	850.6295	850.8295
C-6	849.0355	849.2355	849.4355	849.6355	849.8355	850.0355	850.2355	850.4355	850.6355	850.8355
C-7	849.0415	849.2415	849.4415	849.6415	849.8415	850.0415	850.2415	850.4415	850.6415	850.8415
C-8	849.0475	849.2475	849.4475	849.6475	849.8475	850.0475	850.2475	850.4475	850.6475	850.8475
C-9	849.0535	849.2535	849.4535	849.6535	849.8535	850.0535	850.2535	850.4535	850.6535	850.8535
C-10	849.0595	849.2595	849.4595	849.6595	849.8595	850.0595	850.2595	850.4595	850.6595	850.8595
C-11	849.0655	849.2655	849.4655	849.6655	849.8655	850.0655	850.2655	850.4655	850.6655	850.8655
C-12	849.0715	849.2715	849.4715	849.6715	849.8715	850.0715	850.2715	850.4715	850.6715	850.8715
C-13	849.0775	849.2775	849.4775	849.6775	849.8775	850.0775	850.2775	850.4775	850.6775	850.8775
C-14	849.0835	849.2835	849.4835	849.6835	849.8835	850.0835	850.2835	850.4835	850.6835	850.8835
C-15	849.0895	849.2895	849.4895	849.6895	849.8895	850.0895	850.2895	850.4895	850.6895	850.8895
C-16	849.0955	849.2955	849.4955	849.6955	849.8955	859.0955	850.2955	850.4955	850.6955	850.8955
C-17	849.1015	849.3015	849.5015	849.7015	849.9015	850.1015	850.3015	850.5015	850.7015	850.9015
C-18	849.1075	849.3075	849.5075	849.7075	849.9075	850.1075	850.3075	850.5075	850.7075	850.9075
C-19	849.1135	849.3135	849.5135	849.7135	849.9135	850.1135	850.3135	850.5135	850.7135	850.9135
C-20	849.1195	849.3195	849.5195	849.7195	849.9195	850.1195	850.3195	850.5195	850.7195	850.9195
C-21	849.1255	849.3255	849.5255	849.7255	849.9255	850.1255	850.3255	850.5255	850.7255	850.9255
C-22	849.1315	849.3315	849.5315	849.7315	849.9315	850.1315	850.3315	850.5315	850.7315	850.9315
C-23	849.1375	849.3375	849.5375	849.7375	849.9375	850.1375	850.3375	850.5375	850.7375	850.9375
C-24	849.1435	849.3435	849.5435	849.7435	849.9435	850.1435	850.3435	850.5435	850.7435	850.9435
C-25	849.1495	849.3495	849.5495	849.7495	849.9495	850.1495	850.3495	850.5495	850.7495	850.9495
C-26	849.1555	849.3555	849.5555	849.7555	849.9555	850.1555	850.3555	850.5555	850.7555	850.9555
C-27	849.1615	849.3615	849.5615	849.7615	849.9615	850.1615	850.3615	850.5615	850.7615	850.9615
C-28	849.1675	849.3675	849.5675	849.7675	849.9675	850.1675	850.3675	850.5675	850.7675	850.9675
C-29	849.1735	849.3735	849.5735	849.7735	849.9735	850.1735	850.3735	850.5735	850.7735	850.9735
P-6	849.1813	849.3813	849.5813	849.7813	849.9813	850.1813	850.3813	850.5813	850.7813	850.9813
P-5	849.1845	849.3845	849.5845	849.7845	849.9845	850.1845	850.3845	850.5845	850.7845	850.9845
P-4	849.1877	849.3877	849.5877	849.7877	849.9877	850.1877	850.3877	850.5877	850.7877	850.9877
P-3	849.1909	849.3909	849.5909	849.7909	849.9909	850.1909	850.3909	850.5909	850.7909	850.9909
P-2	849.1941	849.3941	849.5941	849.7941	849.9941	850.1941	850.3941	850.5941	850.7941	850.9941
P-1	849.1973	849.3973	849.5973	849.7973	849.9973	850.1973	850.3973	850.5973	850.7973	850.9973

Table G-2 - Airborne Mobile Station Channels

	CHANNEL BLOCK									
	10	9	8	7	6	5	4	3	2	1
C-1	894.0055	894.2055	894.4055	894.6055	894.8055	895.0055	895.2055	895.4055	895.6055	895.8055
C-2	894.0115	894.2115	894.4115	894.6115	894.8115	895.0115	895.2115	895.4115	895.6115	895.8115
C-3	894.0175	894.2175	894.4175	894.6175	894.8175	895.0175	895.2175	895.4175	895.6175	895.8175
C-4	894.0235	894.2235	894.4235	894.6235	894.8235	895.0235	895.2235	895.4235	895.6235	895.8235
C-5	894.0295	894.2295	894.4295	894.6295	894.8295	895.0295	895.2295	895.4295	895.6295	895.8295
C-6	894.0355	894.2355	894.4355	894.6355	894.8355	895.0355	895.2355	895.4355	895.6355	895.8355
C-7	894.0415	894.2415	894.4415	894.6415	894.8415	895.0415	895.2415	895.4415	895.6415	895.8415
C-8	894.0475	894.2475	894.4475	894.6475	894.8475	895.0475	895.2475	895.4475	895.6475	895.8475
C-9	894.0535	894.2535	894.4535	894.6535	894.8535	895.0535	895.2535	895.4535	895.6535	895.8535
C-10	894.0595	894.2595	894.4595	894.6595	894.8595	895.0595	895.2595	895.4595	895.6595	895.8595
C-11	894.0655	894.2655	894.4655	894.6655	894.8655	895.0655	895.2655	895.4655	895.6655	895.8655
C-12	894.0715	894.2715	894.4715	894.6715	894.8715	895.0715	895.2715	895.4715	895.6715	895.8715
C-13	894.0775	894.2775	894.4775	894.6775	894.8775	895.0775	895.2775	895.4775	895.6775	895.8775
C-14	894.0835	894.2835	894.4835	894.6835	894.8835	895.0835	895.2835	895.4835	895.6835	895.8835
C-15	894.0895	894.2895	894.4895	894.6895	894.8895	895.0895	895.2895	895.4895	895.6895	895.8895
C-16	894.0955	894.2955	894.4955	894.6955	894.8955	895.0955	895.2955	895.4955	895.6955	895.8955
C-17	894.1015	894.3015	894.5015	894.7015	894.9015	895.1015	895.3015	895.5015	895.7015	895.9015
C-18	894.1075	894.3075	894.5075	894.7075	894.9075	895.1075	895.3075	895.5075	895.7075	895.9075
C-19	894.1135	894.3135	894.5135	894.7135	894.9135	895.1135	895.3135	895.5135	895.7135	895.9135
C-20	894.1195	894.3195	894.5195	894.7195	894.9195	895.1195	895.3195	895.5195	895.7195	895.9195
C-21	894.1255	894.3255	894.5255	894.7255	894.9255	895.1255	895.3255	895.5255	895.7255	895.9255
C-22	894.1315	894.3315	894.5315	894.7315	894.9315	895.1315	895.3315	895.5315	895.7315	895.9315
C-23	894.1375	894.3375	894.5375	894.7375	894.9375	895.1375	895.3375	895.5375	895.7375	895.9375
C-24	894.1435	894.3435	894.5435	894.7435	894.9435	895.1435	895.3435	895.5435	895.7435	895.9435
C-25	894.1495	894.3495	894.5495	894.7495	894.9495	895.1495	895.3495	895.5495	895.7495	895.9495
C-26	894.1555	894.3555	894.5555	894.7555	894.9555	895.1555	895.3555	895.5555	895.7555	895.9555
C-27	894.1615	894.3615	894.5615	894.7615	894.9615	895.1615	895.3615	895.5615	895.7615	895.9615
C-28	894.1675	894.3675	894.5675	894.7675	894.9675	895.1675	895.3675	895.5675	895.7675	895.9675
C-29	894.1735	894.3735	894.5735	894.7735	894.9735	895.1735	895.3735	895.5735	895.7735	895.9735
P-6	894.1813	894.3813	894.5813	894.7813	894.9813	895.1813	895.3813	895.5813	895.7813	895.9813
P-5	894.1845	894.3845	894.5845	894.7845	894.9845	895.1845	895.3845	895.5845	895.7845	895.9845
P-4	894.1877	894.3877	894.5877	894.7877	894.9877	895.1877	895.3877	895.5877	895.7877	895.9877
P-3	894.1909	894.3909	894.5909	894.7909	894.9909	895.1909	895.3909	895.5909	895.7909	895.9909
P-2	894.1941	894.3941	894.5941	894.7941	894.9941	895.1941	895.3941	895.5941	895.7941	895.9941
P-1	894.1973	894.3973	894.5973	894.7973	894.9973	895.1973	895.3973	895.5973	895.7973	895.9973

(d) A ground station may not transmit on a communications channel unless it has received the proper identification code. After a ground station has begun to transmit on a communications channel, that channel is not available to ground stations other than the one from which service has been requested until the call is terminated.

(e) A call is terminated by the ground station when either a hang-up signal is transmitted by the airborne mobile station, or the signal from the airborne mobile station on the communications channel is lost for a period of 15 continuous seconds. The hang-up signal is the on-off keying (50% duty cycle) of an unmodulated carrier over a period of one second with pulse duration of 5 milliseconds. However, if all carriers authorized to operate air-ground systems using the channels listed in § 22.857 agree that an alternative hang-up signal and/or procedure would be more efficient or beneficial, such alternative hang-up signal and/or procedure may be used. The carriers must jointly give prior notification to the Commission if an alternative hang-up signal and/or procedure is used.

§ 22.867 Effective radiated power limits.

The effective radiated power (ERP) of ground and airborne stations operating on the channels listed in § 22.857 must not exceed the limits in this section.

(a) The ERP of airborne mobile station transmitters must not exceed 30 watts.

(b) The ERP of ground station transmitters must not exceed 100 watts.

(c) The ERP of low power ground station transmitters operating pursuant to paragraph (a) of § 22.859 must not exceed 1 watt.

§ 22.869 Assignment of control channels.

The Commission will select and assign exclusively one control channel to each air-ground licensee after receiving written notification that the licensee's system will begin providing service within two months.

§ 22.871 Control channel transition period.

The rules in this section provide for a period of transition during which the experimental air-ground system operating on the channels listed in § 22.857 will be discontinued and replaced by a system operating in full compliance with the rules in this subpart.

(a) The experimental system may continue to exclusively use the lower 20 kHz of each channel block (including communications channels C-1, C-2 and C-3) for control channels until July 9, 1993. After that date, communications channels C-1 and C-3 will be available for use by all carriers authorized to operate an air-ground system on the channels listed in § 22.857.

(b) The experimental system may continue to exclusively use a 3.2 kHz control channel contained within the bandwidth of communications channel C-2 of each channel block until September 9, 1996. After that date communications channel C-2 will be available for use by all carriers authorized to operate an air-ground system on the channels listed in § 22.857.

§ 22.873 Construction period for commercial aviation air-ground systems.

Construction of a new commercial aviation air-ground system is considered to be completed for the purpose of this section and § 22.142 when the number of ground stations specified in this section are constructed and operational.

(a) At least 25 ground stations must be constructed and operational within 3 years. Licensees must notify the Commission (FCC Form 489) as soon as this requirement is met. Service to the public may commence as soon as the notification is mailed. If service to the public is not commenced at that time, the notification must contain a statement to this effect.

(b) At least 50 ground stations must be constructed and operational within 5 years. Nationwide service to the public must commence within 5 years. Licensees must notify the Commission (FCC Form 489) as soon as these requirements are met.

§ 22.875 Commercial aviation air-ground system application requirements.

Existing and prospective common carriers may file applications for authority to construct and operate a new nationwide air-ground system on the channels listed in § 22.857 only during window filing periods that may be announced by the Commission in Public Notices. In addition to the requirements elsewhere in this part, such applications must contain the following exhibits:

(a) Written Agreement. A signed agreement between the applicant and at least one airline or airline organization, authorizing the applicant to provide air-ground service on its aircraft.

(b) Financial Qualifications. At the time of filing its application an applicant must demonstrate that it has either a firm financial commitment or available financial resources necessary to construct 50 ground stations and operate for one year after initiation of nationwide air-ground service its proposed air-ground system.

(1) The demonstration of commitment must include and be sufficient to cover the realistic and prudent estimated costs of construction of 50 ground stations, operation and other initial expenses for one year after initiation of nationwide air-ground service. The estimated costs, operation costs and other initial expenses must be itemized. The estimated costs must include the anticipated costs of construction of each ground station.

(2) The firm financial commitment required above must be obtained from a state or federally chartered bank or savings and loan association, or the financial affiliate or subsidiary of an equipment supplier, and must contain a statement that the lender:

(i) has examined the financial condition of the applicant including audited financial statements, and has determined that the applicant is creditworthy;

(ii) that the lender is committed to providing a sum certain to the particular applicant;

(iii) that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and

(iv) that the commitment is not in any way guaranteed by any entity other than the applicant.

(3) Applicants intending to rely on personal or internal resources must submit:

(i) audited financial statements certified within one year of the date of the application, indicating the availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year.

(A) The auditors must be certified public accountants.

(B) Net liquid assets is considered to be the excess of current assets (readily converted to cash) over current liabilities. In order to demonstrate ready convertibility into cash, the identity, liquidity and value of listed assets must be demonstrated. Non-liquid assets can be relied on if the marketability of those assets is documented.

(ii) an audited balance sheet, current within 60 days of filing, which clearly shows the continued availability of sufficient net liquid assets to construct and operate the proposed air-ground system for one year after nationwide service begins.

(c) Service Plan. A service plan containing:

(1) a map or other description of the planned geographic coverage area, including air space over the continental United States, Alaska, Hawaii and other United States territories.

(2) a schedule for construction of 50 ground stations and provision of nationwide service to the public within 5 years from the grant of the initial authorization.

(3) a description of how the system will interconnect with the landline telephone network and be integrated with other air-ground systems, including a statement as to whether the system will be interconnected with international air-ground systems.

(4) a projection of the system capacity, in terms of the maximum number of calls per hour in each area.

(d) Technical Exhibit. A technical description of the proposed system demonstrating compliance with all applicable technical requirements and describing how the proposed system would operate, if authorized. This exhibit must provide the following information:

(1) the number of ground stations to be used, their locations, and the type and quantity of equipment proposed for the system;

(2) a complete description of the procedures and data protocols to be used on the control channel;

(3) the modulation types to be used and their spectral characteristics;

(4) the effective radiated power and transmitter peak envelope power for all transmitters at each ground station location, and the effective radiated power of the airborne mobile stations;

(5) antenna information as follows:

(i) for airborne mobile stations, the antenna type(s) to be used;

(ii) for ground stations, vertical and horizontal radiation patterns, antenna heights above ground level, antenna support structure heights above ground level, ground elevation above mean sea level and any relevant information (e.g. FAA approval) that may be helpful in determining whether ground station antennas require marking and lighting;

(6) analytical data, including calculations, of potential interference within and without the spectrum for the air-ground system;

(7) a statement in compliance with the National Environmental Policy Act of 1969. See § 1.1301 et. seq.

Subpart H - Cellular Radiotelephone Service

§ 22.900 Scope.

The rules in this subpart govern the licensing and operation of cellular radiotelephone systems. Licensing and operation of these systems are also subject to rules elsewhere in this part that apply generally to the Public Mobile Services. However, in case of conflict, the rules in this subpart govern.

§ 22.901 Cellular service requirements and limitations.

Cellular system licensees must provide cellular mobile radiotelephone service upon request to all cellular subscribers in good standing, including roamers (subscribers to cellular systems other than the one from which they are requesting service), while such subscribers are located within the authorized cellular geographic service area (see § 22.911). However, a cellular system licensee may refuse or terminate service, subject to any applicable state or local requirements for timely notification, to any subscriber who operates a cellular telephone in an airborne aircraft in violation of § 22.925 or otherwise fails to cooperate with the licensee in exercising control over mobile stations pursuant to the licensee's responsibility under § 22.927.

(a) Service area information. Licensees must inform prospective subscribers of the area in which reliable service can be expected.

(b) Lack of capacity. If a licensee refuses a request for cellular service because of a lack of system capacity, it must report that fact to the Commission in writing, explaining how it plans to increase capacity.

(c) Dispatch service. Cellular systems must not offer or provide dispatch service.

(d) Alternative technologies and auxiliary services. Licensees of cellular systems may use alternative cellular technologies and/or provide auxiliary common carrier services on the communication channels in their assigned channel block, provided that cellular service is available to subscribers whose mobile equipment conforms to the cellular system compatibility specification (see § 22.933).

(1) Notification. Cellular licensees must notify the Commission (FCC Form 489) at least thirty days prior to implementation of alternative technology or auxiliary services. Such notifications must include an exhibit describing the alternative technology to be used and/or auxiliary service to be offered, and a list of any new or modified transmitting facilities. Licensees must perform or obtain an engineering analysis to ensure that interference to the service of other cellular systems will not result from the implementation of auxiliary services or alternative cellular technologies.

(2) Exemptions. Alternative technology and auxiliary service

operations are exempt from the channeling requirements of § 22.905, the modulation requirements of § 22.915 and the emission limitations of § 22.917, except for emission limitations that apply to emissions outside the assigned channel block.

§ 22.903 Conditions applicable to former Bell operating companies.

Ameritech Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, U.S. West, Inc., their successors in interest and affiliated entities (former BOCs) may engage in the provision of cellular service only in accordance with the conditions in this section, unless otherwise authorized by the Commission. Former BOCs may, subject to other provisions of law, have a controlling or lesser interest in or be under common control with separate corporations that provide cellular service only under the following conditions:

(a) Access to landline facilities. Former BOCs must not sell, lease or otherwise make available to the separate corporation any transmission facilities which are used in any way for the provision of its landline telephone services, except on a compensatory, arm's-length basis. Separate corporations must not own any facilities for the provision of landline telephone service. Access to landline exchange and transmission facilities for the provision of cellular service must be obtained by separate corporations on the same terms and conditions as those facilities are made available to other entities.

(b) Independence. Separate corporations must operate independently in the provision of cellular service. Each separate corporation must -

(1) maintain its own books of account;

(2) have separate officers;

(3) employ separate operating, marketing, installation and maintenance personnel; and,

(4) utilize separate computer and transmission facilities in the provision of cellular services.

(c) Research or development. Any research or development performed by former BOCs for separate corporations, either separately or jointly, must be on a compensatory basis.

(d) Transactions. All transactions between the separate corporation and the former BOC or its affiliates which involve the transfer, either direct or by accounting or other record entries, of money, personnel, resources, other assets or any things of value, shall be reduced to writing. A copy of any contract, agreement or other arrangement entered between such entities with regard to interconnection with landline network exchange and transmission facilities must be filed with the Commission within thirty days after the contract, agreement, or other arrangement is made. A copy of all other contracts, agreements or arrangements between such entities shall be kept available by the separate corporation for inspection upon reasonable request by the Commission. The provision shall not apply to any transaction governed by the provision of an effective state or federal tariff.

(e) Promotion. Former BOCs must not engage in the sale or promotion of cellular service on behalf of the separate corporation. However, this does not prohibit joint advertising or promotional efforts by the landline carrier and its cellular affiliate.

(f) Proprietary information. Former BOCs must not provide to any such separate corporation any customer proprietary information, unless such information is publicly available on the same terms and conditions.

(g) Provision of other Public Mobile services. Separate corporations may include, as part of their operations, the provision of other Public Mobile services.

§ 22.905 Channels for cellular service.

The following channels are allocated for block assignment in the Cellular Radiotelephone Service. All channels have a bandwidth of 40 kHz and are designated by their center frequencies in MegaHertz.

CHANNEL BLOCK A

416 communication channel pairs

base	mobile	base	mobile
869.040	824.040	890.010	845.010
869.070	824.070	890.040	845.040
|	|	|	|
|	|	|	|
879.990	834.990	891.480	846.480

21 control channel pairs

834.390	879.390
834.420	879.420
|	|
|	|
834.990	879.990

CHANNEL BLOCK B

416 communication channel pairs

base	mobile	base	mobile
880.020	835.020	891.510	846.510
880.050	835.050	891.540	846.540
|	|	|	|
|	|	|	|
889.980	844.980	893.970	848.970

21 control channel pairs

835.020	880.020
835.050	880.050
|	|
|	|
835.620	880.620

(a) Each channel block is assigned exclusively to one licensee for use in that licensee's cellular geographic service area (see § 22.911).

(b) Licensees may use any channel pair from the assigned channel block at any of their authorized transmitter locations, subject to the prior coordination requirements of § 22.907.

(c) In the event harmful interference occurs between two or more cellular systems and such interference cannot be resolved between the licensees thereof, the Commission may require the licensees to make such changes as it deems necessary to avoid such interference.

§ 22.907 Coordination of channel usage.

Licensees in the Cellular Radiotelephone Service must coordinate, with the appropriate parties, channel usage at each transmitter location within 121 kilometers (75 miles) of any transmitter locations authorized to other licensees or proposed by tentative selectees and other applicants with non-mutually exclusive applications.

(a) Licensees must cooperate and make reasonable efforts to resolve technical problems that may inhibit effective and efficient use of the cellular radio spectrum; however, licensees are not obligated to suggest extensive changes to or redesign other licensees' cellular systems. Licensees must make reasonable efforts to avoid blocking the growth of other cellular systems that are likely to need additional capacity in the future.

(b) If technical problems are addressed by an agreement or operating arrangement between the licensees that would require procedures to be taken to reduce the likelihood of intersystem interference or would result in a reduction of quality or capacity of either system, the licensees must notify the Commission.

§ 22.909 Cellular markets.

Cellular markets are standard geographic areas used by the Commission for administrative convenience in the licensing of cellular systems. Cellular markets comprise Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs).

(a) MSAs. Metropolitan Statistical Areas are 306 areas, including New England County Metropolitan Areas and the Gulf of Mexico Service Area (water area of the Gulf of Mexico, border is the coastline), defined by the Office of Management and Budget, as modified by the Commission. MSAs are listed in Public Notices CL-69A and 92-40.

(b) RSAs. Rural Service Areas are 428 areas, other than MSAs, established by the Commission. RSAs are listed in Public Notices CL-88-110 and 92-40.

§ 22.911 Cellular geographic service area.

The Cellular Geographic Service Area (CGSA) of a cellular system is the geographic area considered by the Commission to be served by the cellular system. The CGSA is the area within which cellular systems are entitled to protection and within which adverse effects for the purpose of determining whether a petitioner has standing are recognized. Licensees of the first cellular system on each channel block in MSAs 1 through 90 must maintain a CGSA that covers 75% of the geographic area of the MSA. Licensees of the first cellular system on each channel block in MSAs 91 through 305 must maintain a CGSA that covers 75% of the geographic area or population of the MSA.

(a) CGSA determination. The CGSA is the composite of the service areas of all of the cells in the system, excluding any area outside the cellular market boundary, except as provided in paragraph (c) of this section, and excluding any area within the CGSA of another cellular system. The service area of a cell is the area within its service area boundary. The distance to the service area boundary is calculated as a function of effective radiated power (ERP) and antenna center of radiation height above average terrain (HAAT).

(1) Except as provided in paragraph (a)(2) of this section, the radial distance from a cell transmitting antenna to its service area boundary is calculated as follows:

$$d = 2.531 \times h^{0.34} \times p^{0.17}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(2) The radial distance from a cell transmitting antenna in the Gulf of Mexico MSA to its service area boundary is calculated as follows:

$$d = 6.895 \times h^{0.30} \times p^{0.15}$$

where d is the radial distance in kilometers
h is the radial antenna HAAT in meters
p is the radial ERP in Watts

(3) Whenever the actual HAAT is less than 30 meters (98 feet), 30 must be used as the value for h in the above formula.

(4) The value used for p in the above formula must not be less than 27 dB less than the maximum ERP in any direction.

(b) Alternative CGSA determination. If a carrier believes that the method prescribed in paragraph (a) of this section produces a CGSA that departs significantly from the geographical area where reliable cellular service is actually provided, the carrier may submit for the Commission's consideration a depiction of what the carrier believes the CGSA should be. Such submissions must be accompanied by one or more supporting propagation studies using methods appropriate for the 800-900 MHz frequency range, including all supporting data and calculations, and/or by extensive field strength measurement data. For the purpose of such submissions, cellular service is considered to be provided where the predicted or measured median field strength equals or exceeds 32 dBμV/m. If, after consideration of such submissions, the Commission finds that adjustment to a CGSA is warranted, the Commission may so order.

(c) CGSA extension areas. Areas outside of the MSA or RSA boundary, but within the service area as calculated using the method of paragraph (a) of this section, are part of the CGSA only under the following circumstances:

(1) During the five year fill-in period of the system in the MSA or RSA containing the extension, the licensees of systems on the same channel block in adjacent MSAs or RSAs may agree that the portion of the service area of one system that extends into unserved area in the other system's MSA or RSA is part of the CGSA of the former system.

(2) At the end of the five year fill-in period of the system in the MSA or RSA containing the extension, the portion of the service area that extends into unserved area in another MSA or RSA becomes part of the CGSA, provided that the licensee of the system so extended files a system information update in accordance with § 22.947(c).

(3) For original systems in MSAs, extensions of the CGSA authorized by the Commission are part of the CGSA to the extent authorized.

(d) Unserved areas. Unserved areas are areas outside of all existing CGSAs (on either of the channel blocks), to which the Communications Act of 1934, as amended, is applicable.

§ 22.912 Service area boundary extensions.

This section contains cellular system design requirements in regard to service area boundary extensions beyond cellular market boundaries.

(a) Contract extensions. Licensees of the first authorized cellular systems on the same channel block in adjacent cellular markets may agree to allow service area boundary extensions into their markets during the five year fill-in period of the market into which the service area extends.

(b) Unserved area systems. Cellular systems proposed for unserved areas must be designed such that the service area boundaries of the cells do not extend:

(1) into the CGSA of any other licensee's cellular system on the same channel block; or,

(2) beyond the boundary of the cellular market, except that the Commission may authorize de minimis extensions of the service area boundaries beyond the cellular market boundary provided that:

(i) the system is designed to serve only areas within the CGSA;

(ii) the extensions are unavoidable because of irregular terrain or unusual market boundaries; and,

(iii) the extensions are into a market on a channel block for which the five year fill-in period has not elapsed.

§ 22.913 Effective radiated power limits.

The effective radiated power (ERP) of transmitters in the Cellular Radiotelephone Service must not exceed the limits in this section.

(a) Maximum ERP. The effective radiated power (ERP) of base transmitters and cellular repeaters must not exceed 500 Watts. The ERP of mobile transmitters and auxiliary test transmitters must not exceed 7 Watts.

(b) Height-power limit. The ERP of base transmitters must not exceed the amount that would result in an average distance to the service area boundary of 41.5 kilometers (26 miles). The average distance to the service area boundary is calculated by taking the arithmetic mean of the distances determined using the procedures specified in § 22.911 for the eight cardinal radial directions.

§ 22.915 Modulation requirements.

Cellular systems must be capable of providing service using the types of modulation described in the cellular system compatibility specification.

(a) Non-voice modulating signals. Modulating signals other than voice signals, such as data signals, may be transmitted, provided the resulting frequency modulated emission exhibits spectral characteristics not exceeding those resulting from voice modulation.

(b) Modulation levels. The levels of the modulating signals must be set to the values specified in this paragraph, and must be maintained within ±10% of those values.

(1) The instantaneous frequency deviation resulting from the main modulating signal must be ±12 kHz.

(2) The instantaneous frequency deviation resulting from the supervisory audio tones must be ±2 kHz.

(3) The instantaneous frequency deviation resulting from the signaling tone must be ±8 kHz.

(4) The instantaneous frequency deviation resulting from wideband data signals must be ±8 kHz.

(c) Deviation limitation circuitry. Cellular transmitters must be equipped with circuitry that automatically prevents modulation levels for voice transmissions from exceeding the limits specified in this section.

(d) Audio filter characteristics. Except as provided in § 22.917, radiotelephony signals applied to the modulator from the modulation limiter must be attenuated as a function of frequency as specified in this paragraph.

(1) For mobile stations, these signals must be attenuated, relative to the level at 1 kHz, as follows:

(i) In the frequency ranges of 3.0 to 5.9 kHz and 6.1 to 15.0 kHz, signals must be attenuated by at least $40 \times \log (f \div 3)$ dB, where f is the frequency of the signal in kHz.

(ii) In the frequency range of 5.9 to 6.1 kHz, signals must be attenuated at least 35 dB.

(iii) In the frequency range above 15 kHz, signals must be attenuated at least 28 dB.

(2) For base stations, these signals shall be attenuated, relative to the level at 1 kHz, as follows:

(i) In the frequency range of 3 to 15 kHz, signals must be attenuated by at least $40 \times \log (f \div 3)$ dB, where f is the frequency of the signal in kHz.

(ii) In the frequency range above 15 kHz, signals must be attenuated by at least 28 dB.

(3) Filtering is not required for the supervisory audio tones, signaling tones or wideband data signals.

§ 22.917 Emission limitations for cellular.

The rules in this section govern the spectral characteristics of emissions in the Cellular Radiotelephone Service.

(a) Analog radiotelephony emissions. F3E emissions must be used only on the communication channels.

(b) F3E/F3D emission mask for use with audio filter. For F3E and F3D emissions, except as provided in paragraph (c) of this section, the mean power of emissions must be attenuated below the

mean power of the unmodulated carrier wave (P) as follows:

(1) On any frequency removed from the carrier frequency by more than 20 kHz but not more than 45 kHz:

at least 26 dB;

(2) On any frequency removed from the carrier frequency by more than 45 kHz, up to the first multiple of the carrier frequency:

at least 60 decibels or 43 + 10 log P dB, whichever is the lesser attenuation.

(c) Alternative F3E/F3D emission mask. For F3E and F3D emissions, transmitters may comply with the emission limitations in this paragraph in lieu of compliance with paragraph (b) of this section and the audio filter requirement of § 22.915.

(1) The mean power of any emission removed from the carrier frequency by a displacement frequency (f_d in kHz) must be attenuated below the mean power of the unmodulated carrier (P) as follows:

(i) On any frequency removed from the carrier frequency by more than 12 kHz but not more than 20 kHz:

at least 117 log ($f_d \div 12$) dB;

(ii) On any frequency removed from the carrier frequency by more than 20 kHz, up to the first multiple of the carrier frequency:

at least 100 log ($f_d \div 11$) dB or 60 dB or 43 + 10 log P dB, whichever is the lesser attenuation;

(2) For mobile stations, modulating signals other than the supervisory audio tone in the frequency range of 5.9 to 6.1 kHz must be attenuated, relative to the level at 1 kHz, at least 35 dB.

(d) F1D emission mask. For F1D emissions, the mean power of emissions must be attenuated below the mean power of the unmodulated carrier (P) as follows:

(1) On any frequency removed from the carrier frequency by more than 20 kHz but not more than 45 kHz:

at least 26 dB;

(2) On any frequency removed from the carrier frequency by more than 45 kHz but not more than 90 kHz:

at least 45 dB;

(3) On any frequency removed from the carrier frequency by more than 90 kHz, up to the first multiple of the carrier frequency:

at least 60 dB or 43 + 10 log P dB, whichever is the lesser attenuation.

(e) Out of band emissions. The mean power of emissions must be attenuated below the mean power of the unmodulated carrier (P) on any frequency twice or more than twice the fundamental frequency by:

at least 43 + 10 log P dB.

(f) Mobile emissions in base frequency range. The mean power of any emissions appearing in the base station frequency range from cellular mobile transmitters operated must be attenuated to a level not to exceed -80 dBm at the transmit antenna connector.

(g) Interference from spurious emissions. If any emission from a transmitter operating in this service results in interference to users of another radio service, the Commission may require a greater attenuation of that emission than specified in this section.

(h) Measurement procedure. The following spectrum analyzer bandwidth settings should be used for measurement of spurious emissions:

(1) When operating in the radiotelephony mode or the supervisory audio tone mode:

(i) For any emission not more than 45 kHz removed from the carrier frequency: 300 Hz;

(ii) For any emission more than 45 kHz removed from the carrier frequency: 30 kHz.

(2) When operating in the wideband data mode or the signaling tone mode:

(i) For any emission not more than 60 kHz removed from the carrier frequency: 300 Hz;

(ii) For any emission more than 60 kHz removed from the carrier frequency: 30 kHz.

§ 22.919 Electronic serial numbers.

The Electronic Serial Number (ESN) is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to any cellular system. Each mobile transmitter must have a unique ESN and must comply with the following specifications.

(a) The ESN must be factory set and must not be alterable, transferable, removable or otherwise able to be manipulated in the field.

(b) The ESN host component must be permanently attached to a main circuit board of the mobile transmitter and the integrity of the unit's operating software must not be alterable. The ESN must be isolated from fraudulent contact and tampering. If the ESN host component does not contain other information, that component must not be removable, and its electrical connections must not be accessible. If the ESN host component contains other information, the ESN must be encoded using one or more of the following techniques:

(1) multiplication or division by a polynomial;

(2) cyclic coding;

(3) the spreading of ESN bits over various non-sequential memory locations.

(c) Cellular mobile equipment must be designed such that any attempt to remove, tamper with, or change the ESN chip, its logic system, or firmware originally programmed by the manufacturer will render the mobile transmitter inoperative.

§ 22.923 Cellular system configuration.

Mobile stations communicate with and through base stations only. Base stations communicate with mobile stations. Auxiliary test stations may communicate with base or mobile stations for the purpose of testing equipment.

§ 22.925 Prohibition on airborne operation of cellular telephones.

Cellular telephones installed in or carried aboard airplanes, balloons or any other type of aircraft must not be operated while such aircraft are airborne (not touching the ground). When any aircraft leaves the ground, all cellular telephones on board that aircraft must be turned off. The following notice must be posted on or near each cellular telephone installed in any aircraft:

> "The use of cellular telephones while this aircraft is airborne is prohibited by FCC rules, and the violation of this rule could result in suspension of service and/or a fine. The use of cellular telephones while this aircraft is on the ground is subject to FAA regulations."

§ 22.927 Responsibility for mobile stations.

Mobile stations that are subscribers in good standing to a cellular system are, when receiving service from that cellular system pursuant to legally effective tariff provisions, considered to be operating under the authorization of that cellular system. Cellular system licensees are responsible for exercising effective operational control over mobile stations receiving service through their cellular systems.

(a) Installation, maintenance and repair. Except for subscriber-provided mobile transmitters, cellular system licensees are responsible for the proper installation, maintenance and repair of mobile transmitters. Subscribers are responsible for the proper installation, maintenance and repair of subscriber-provided mobile transmitters.

(b) Roamers. Mobile stations that are subscribers in good standing to a cellular system are, while receiving service from a different cellular system pursuant to legally effective tariff provisions, considered to be operating under the authorization of such different system. The licensee of such different system is responsible, during such temporary period, for such mobile stations as if they were subscribers to it.

§ 22.933 Cellular system compatibility specification.

Equipment used in the Cellular Radiotelephone Service must be designed in compliance with the technical specifications for compatibility of mobile and base stations in the Cellular Radiotelephone Service contained in "Cellular System Mobile Station-Land Station Compatibility Specification" (April 1981 Ed.), Office of Engineering and Technology Bulletin No. 53. This bulletin is contained in Appendix D to the Report and Order in CC Docket No. 79-318, and was published in the Federal Register of May 21, 1981. Copies may be obtained from the Commission's copying contractor. Certain special operational features, detailed in Electronic Industries Association Interim Standard CIS-3, may be activated at the option of the local cellular licensee. Use of these special operational features is permissible, provided that the compatibility of equipment within the Cellular Radiotelephone Service as specified in OET Bulletin No. 53 is not affected.

§ 22.935 Procedures for comparative renewal proceedings.

The procedures in this section apply to comparative hearings for renewal proceedings in the Cellular Radiotelephone Service.

(a) The presiding officer will schedule a first hearing session as soon as practicable after the date for filing rebuttal evidence. This first session will be an evidentiary admission session at which each applicant will identify and offer its previously circulated direct and rebuttal exhibits, and each party will have an opportunity to lodge objections.

(b) After accepting the exhibits into evidence, the presiding officer will entertain motions to cross-examine and rule whether any sponsoring witness needs to be produced for cross-examination. Determination of what, if any, cross-examination is necessary is within the sound judicial discretion of the presiding officer, the prevailing standard being whether the person requesting cross-examination has persuasively demonstrated that written evidence is ineffectual to develop proof. If cross-examination is necessary, the presiding officer will specify a date for the appearance of all witnesses. In addition, if the designation order points out an area where additional underlying data is needed, the presiding officer will have the authority to permit the limited use of discovery procedures. Finally, the presiding officer may find that certain additional testimony or cross-examination is needed to provide a complete record for the Commission. If so, the presiding officer may schedule a further session.

(c) After the hearing record is closed, the presiding officer may request Proposed Findings of Fact and Conclusions of Law to be filed within thirty days of the final hearing session. Replies are not permitted except in unusual cases and then only with respect to the specific issues named by the presiding officer.

(d) The presiding officer will then issue an Initial Decision, preferably within sixty days of receipt of the last pleadings. If mutually exclusive applications are before the presiding officer, the presiding officer will determine which applicant is best qualified. The presiding officer may also rank the applicants in order of merit if there are more than two.

(e) Parties will have thirty days in which to file exceptions to the Initial Decision. The Common Carrier Bureau has authority to determine, at the time of designation for hearing, that such exceptions will be taken directly to the Commission rather than to the Review Board.

§ 22.937 Demonstration of financial qualifications.

Except as provided in paragraph (g) of this section, each applicant for a new cellular system must demonstrate that it has, at the time the application is filed, either a separate market-specific firm financial commitment or available financial resources sufficient to construct and operate for one year the proposed cellular system. Each applicant for assignment of license or consent to transfer of control must demonstrate that the proposed assignee or transferee has, at the time the application is filed, either a separate market-specific firm financial commitment or available financial resources sufficient to construct and operate for one year the proposed cellular system.

(a) Estimated costs. The demonstration required by this section must include a realistic and prudent estimate of the costs of construction, operating and other initial expenses for one year.

(b) Source of financing. The firm financial commitment must be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution, or the financial arm of a capital equipment supplier. The firm financial commitment may be contingent upon the applicant's obtaining an authorization.

(c) Lender's statement. The firm financial commitment must contain a statement that:

(1) the lender has examined the financial condition of the applicant, including audited financial statements if applicable, and has determined that the applicant is creditworthy;

(2) the lender has examined the financial viability of each proposal for which the applicant intends to use the commitment;

(3) the lender is committed to providing a sum certain to the particular applicant;

(4) the lender's willingness to enter into the commitment is based solely on its relationship with the applicant; and,

(5) the commitment is not in any way guaranteed by any entity other than the applicant.

(d) Showings of financial resources. Applicants relying upon personal or internal financial resources must submit the following:

(1) audited financial statements, certified within one year of the date of the cellular application, that show the availability of sufficient net current assets to construct and operate for one year the proposed cellular system;

(2) a balance sheet current within 60 days of the date of filing that shows the continued availability of sufficient net current assets to construct and operate for one year the proposed cellular system; and,

(3) a certification by the applicant or an officer of the applicant organization attesting to the validity of the unaudited balance sheet.

(e) Parent corporation financing. Applicants relying upon financing obtained from parent corporations must submit the showings listed in paragraph (d) of this section as the information pertains to the parent corporation.

(f) Notice upon default. In addition to the disclosures required by paragraph (c) of this section, any loan or other credit arrangement providing for a chattel mortgage or secured interest in any proposed cellular system must include a provision for a minimum of ten (10) days prior written notification to the licensee, and to the Commission, before any such equipment may be repossessed under default provision of the agreement.

(g) Adjacent system exemption. Any licensee applying for an unserved area adjacent to its existing cellular system, to integrate such area into the existing system, is exempt from the financial demonstration requirements of this section.

§ 22.939 Limitations on amendments to applications.

This section places limits, in addition to those in § 22.122, on amendments to applications for unserved areas.

(a) Amendments to Phase I applications are not accepted before the conclusion of the random selection process. Minor amendments to Phase I applications may be filed after the random selection process by the tentative selectee. Amendments in compliance with §1.65 of this chapter must be filed within 30 days of Public Notice announcing the tentative selectee.

(b) Major amendments to Phase I applications are not accepted.

§ 22.941 System identification numbers.

System identification numbers (SIDs) are 15 bit binary numbers assigned to cellular systems. SIDs are transmitted by the cellular systems so that cellular mobile stations can determine whether the system through which they are communicating is a system to which they subscribe, or whether they are considered by the system to be roamers.

(a) The Commission assigns an SID to each cellular system on its initial authorization.

(b) Licensees must notify the Commission (FCC Form 489) of any change in their cellular system's SID(s).

§ 22.943 Limitations on assignment of cellular authorizations.

The following limitations apply to applications for assignment of authorizations in the Cellular Radiotelephone Service.

(a) Unserved area systems. Except as provided in paragraph (a)(2) of this section, the Commission will not grant any application for assignment of the authorization of a cellular system licensed to serve an unserved area until the system has provided service to the public for one year.

(1) Licensees must not enter into any agreement (e.g. option agreement or management contract) to transfer control of the licensee of the system until the system has provided service to the public for one year.

(2) The Commission may grant an application for a pro forma assignment of authorization.

(b) RSAs. The sale, transfer, assignment or other alienation of any application to operate a new cellular system in a rural service area is prohibited. This limitation includes any form of alienation, including option arrangements and agreements, and equity and debt placement plans.

(c) Trafficking. Applications for assignment of authorization in the Cellular Radiotelephone Service are subject to the provisions of § 22.139(a) of this part, except for:

(1) the trading of an ownership interest in an authorized but unconstructed cellular system in one market for a commensurate interest in a cellular system in another market; or,

(2) assignment of a cellular authorization obtained by random selection, prior to commencement of service.

§ 22.945 Ownership and other interest in applicants.

This section governs interest in applicants with mutually exclusive and same market applications for an initial cellular system. For the purposes of this section, "interest in an application" means interest

in the applicant.

(a) General. Except as otherwise provided in this section, parties must not have any interest, direct or indirect, in more than one application for authority to operate a new cellular system in the same cellular market.

(b) Abutting CGSAs. Licensees of existing systems whose cellular geographic service area (CGSA) abuts a proposed CGSA may each file one application that is mutually exclusive with the applications of other such licensees, even though they share common owners, provided that such licensees do not thereby acquire a simultaneous interest in applications for both channel blocks in any geographical area.

(c) Publicly traded corporate applicants. Parties must not have any interest, direct or indirect, in more than one mutually exclusive application for which the applicant is a publicly traded corporation, except that ownership interests of less than 5% are not considered. Ownership and other interests in applicants are attributed to their holder and deemed cognizable as set forth below.

(1) Passive investors. Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts are deemed to have a cognizable interest in a publicly traded cellular applicant only if they hold 10% or more of the stock of the applicant. This provision applies only if an applicant in which such parties hold an interest certifies in its application that no such party has exerted or attempted to exert any influence or control over the officers of the applicant.

(2) Multiplier. Attribution of ownership interests in a publicly traded cellular applicant that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50 percent, it is not included in the multiplication.

§ 22.946 Construction periods and requirements for cellular systems.

This section contains the normal term for construction periods and other service initiation requirements for cellular systems.

(a) Commencement of service. New cellular systems must be at least partially constructed and begin providing cellular service to the public by the end of the construction periods specified in Table H-1. All construction periods begin on the date of grant of the initial authorization.

(1) To satisfy the requirement of paragraph (a) of this section, a cellular system must be interconnected with the public switched telephone network (PSTN) and must be providing service to mobile stations operated by its subscribers and roamers. A cellular system is not considered to be providing service to the public if mobile stations can not make telephone calls to landline telephones and receive telephone calls from landline telephones through the PSTN, or if the system intentionally serves only roamer stations.

(2) The licensee must notify the Commission (FCC Form 489) when the requirements of paragraph (a) of this section are met.

(b) Completion of authorized system. Construction of new cellular systems must be completed in accordance with the following:

Table H-1 - Construction Periods for Cellular Systems

Type of Cellular System	Construction Period
the first system authorized on each channel block in markets 1-90	36 months
the first system authorized on each channel block in all other markets and any subsequent systems authorized pursuant to contracts in partitioned RSAs	18 months
unserved area systems	12 months

(1) The first cellular system authorized on each channel block in each market must be constructed such that at least 75% of the authorized CGSA (or 75% of the population in the authorized CGSA) is covered within 36 months. If this requirement is not met, the Commission may reduce the authorized CGSA such that the 75% coverage is achieved.

(2) Each unserved area cellular system must be completed within one year from the date the initial authorization is granted.

(c) Construction period for major modifications. Major modifications must be constructed within one year from the grant date of the application for modification is granted. In the case of unserved area cellular systems, this does not extend the period, specified in paragraph (b)(2) of this section, for constructing the original proposal. Failure to comply with this requirement results in the termination of the authorization for the major modification, pursuant to § 22.144(b).

§ 22.947 Five year fill-in period.

The licensee of the first cellular system authorized on each channel block in each cellular market is afforded a five year period, beginning on the date the initial authorization for the system is granted, during which it may expand the system within that market.

(a) Exclusive right to expand within market. Except as provided in paragraph (b) of this section, the Commission does not accept applications for authority to operate a new cellular system in any unserved area on that channel block in that market during the five year fill-in period for each such cellular system.

(b) Partitioned RSAs. During the five year fill-in period, the licensee of the first cellular system on each channel block in each Rural Service Area (RSA) may enter into contracts with eligible parties, allowing such parties to apply for a new cellular system on that channel block within the RSA. The Commission may grant such applications if they are in compliance with the rules in this part.

RSAs with two or more authorized cellular systems on the same channel block during the five year fill-in period are referred to as partitioned RSAs.

(1) The contract must define the CGSA of the subsequent cellular system in accordance with § 22.911, including any expansion rights ceded. If not exercised, any such expansion rights terminate at the end of the five year fill-in period.

(2) The five year fill-in period begins on the date the initial authorization for the first cellular system is granted, and is not extended or affected in any way by the initial authorization of any subsequent cellular systems pursuant to paragraph (b) of this section.

(c) System information update. Sixty days before the end of the five year fill-in period, the licensee of the each cellular system authorized on each channel block in each cellular market must file, in triplicate, a full scale map, a reduced map, and an updated channel usage chart. Separate maps must be submitted for each market into which the CGSA extends, showing the extension area in the adjacent market. Maps showing extension areas must be marked and labeled for the market into which the CGSA extends. These maps and the channel usage chart must accurately depict the cell locations and coverage of the system at the end of the five year fill-in period. The maps and chart must be filed at the Mobile Services Division, Common Carrier Bureau, Federal Communications Commission, Washington, DC 20554. If any changes to the system occur after the filing of these maps and chart, but before the end of the five year fill-in period, the licensee must file, in triplicate, additional maps and/or charts as necessary to insure that the cell locations and coverage of the system as of the end of the five year fill-in period are accurately depicted.

(1) The scale of the full-size map must be 1:250,000, regardless of whether any different scale is used for the reduced map. The map must have a legend, a distance scale and correctly labeled latitude and longitude lines. The map must be clear and legible. The map must accurately show the cell sites (transmitting antenna locations), the entire CGSA, any extension of the composite service area boundary beyond the CGSA (see § 22.911) and the relevant portions of the cellular market boundary. The date the map was initially drawn or revised must appear on the map.

(2) The reduced map must be a proportional reduction, to 8½ × 11 inches, of the full-size map required in paragraph (c)(1) of this section, unless it proves to be impractical to depict the entire cellular market by reducing the full-size map. In such instance, an 8½ × 11 inch map of a different scale may be substituted, provided that the required features of the full-size map are clearly depicted and labeled.

§ 22.949 Unserved area licensing phases, procedures and filing windows.

The licensing process for unserved areas in cellular markets has two phases: Phase I and Phase II.

(a) Phase I. Phase I is a one-day filing window that provides an opportunity for all parties to apply for authority to operate new cellular systems in unserved areas.

(1) Phase I applications for authority to operate a new cellular system in an unserved area must be filed on the 31st day after the expiration of the five year fill-in period of the authorized system on the desired channel block in the desired market.

(2) Only one Phase I application is granted on each channel block in each market. All timely-filed Phase I applications for authority to operate a new cellular system in the same market on the same channel block are included in a random selection process, after which the selected application may be granted and the others dismissed.

(b) Phase II. Phase II is an open-ended filing process that allows parties to apply for any unserved areas that may remain after the Phase I process is complete.

(1) If a Phase I application for authority to operate a new cellular system in an unserved area is granted, Phase II applications for authority to operate a new cellular system in any remaining unserved area may be filed on or after the 121st day after the Phase I application was granted. If no Phase I applications for authority to operate a new cellular system in an unserved area are granted, Phase II applications for authority to operate a new cellular system in an unserved area may be filed on or after the 31st day after the Commission dismissed the last pending Phase I application on the desired channel block in the desired market. If no Phase I applications for authority to operate a new cellular system in an unserved area are received, Phase II applications for authority to operate a new cellular system in an unserved area may be filed on or after the 32nd day after the expiration of the five year fill-in period of the authorized system on the desired channel block in the desired market.

(2) All mutually exclusive Phase II applications for authority to operate a new cellular system filed on the same day are included in a random selection process, after which the selected application may be granted and the others dismissed. Otherwise, the first-filed Phase II application, as determined by the filing date may be granted and any other mutually exclusive applications dismissed.

(c) Filing date. For the purposes of this section, the filing date of an application is the date on which that application was received or the date on which the most recently filed major amendment to that application was received.

(d) Settlements. Settlements among some, but not all, applicants with mutually exclusive applications (including same market Phase I applications) for unserved areas are prohibited. Settlements among all applicants with mutually exclusive applications (or same market Phase I applications) are allowed and must be filed no later than 2 business days before the random selection process is scheduled to take place.

§ 22.951 Minimum coverage requirement.

Applications for authority to operate a new cellular system in an unserved area, other than those filed by the licensee of an existing system that abuts the unserved area, must propose a contiguous cellular geographical service area (CGSA) of at least 130 square kilometers (50 square miles).

§ 22.953 Content and form of applications.

Applications for authority to operate a new cellular system in an unserved area must comply with the specifications in this section.

(a) Forms, pages and exhibits. Forms, pages and exhibits must be prepared exactly as described and assembled in the order listed

in this section.

(1) Application cover. The paper original of each application must be enclosed in a stiff cover fastened securely along the left edge, without exposed sharp edges.

(2) Transmittal sheet. The first page after the front cover of the application must be the transmittal sheet.

(i) Copies of the required transmittal sheet may be obtained by contacting the Consumer Assistance Office, Federal Communications Commission, 1919 M Street NW, Washington, DC 20554.

(ii) On the transmittal sheet, the following information is required: the name of the applicant, the channel block, and the market number or numbers and the market name or names in which the proposed CGSA is located. This information on the transmittal sheet must match exactly the information on the jacket of the microfiche and the cover of the application.

(iii) The transmittal sheet also contains a certification. Applicants must certify to the following:

> I hereby certify that this application for an authorization in the Cellular Radiotelephone Service is complete in every respect and contains all of the information required by FCC Form 401 and the Federal Communications Commission's rules governing this service. I acknowledge that, if upon examination by the Commission, this certification is found to be incorrect, the Commission will dismiss this application without further consideration.
>
> I certify that I am the real party-in-interest in this application and there are no agreements or understandings other than those, if any, disclosed in this application, which provide that someone other than the applicant has a direct or indirect interest in the application. I also certify that the applicant intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.
>
> I declare, under penalty of perjury, that I am the authorized representative of the above-named applicant in the matter of this application, that I have read the foregoing certification, and that the matter and things therein stated are true and correct.

(iv) The certification must be signed and dated in accordance with the requirements of §1.743 of this chapter. The certification must be signed in ink. Mechanical reproductions of the signature must not be used. The name of and position held by the person signing must be typed or clearly and legibly printed beneath the signature.

(3) Table of contents. The table of contents must list all of the exhibits to the application.

(4) FCC Form 401. All information required for cellular applications on FCC Form 401 must be supplied.

(5) Exhibits. The following exhibits must be set off by tabs and numbered as follows:

(i) EXHIBIT I - full-size map. The scale of the full-size map must be 1:250,000, regardless of whether any different scale is used for the reduced map required in Exhibit II. The map must have a legend, a distance scale and correctly labeled latitude and longitude lines. The map must be clear and legible. The map must accurately show the cell sites (transmitting antenna locations), the entire CGSA, any extension of the composite service area boundary beyond the CGSA (see § 22.911) and the relevant portions of the cellular market boundary.

(ii) EXHIBIT II - reduced map. This map must be a proportional reduction, to 8½ × 11 inches, of the full-size map required for Exhibit I, unless it proves to be impractical to depict the entire cellular market by reducing the full-size map. In such instance, an 8½ × 11 inch map of a different scale may be substituted, provided that the required features of the full-size map are clearly depicted and labeled.

(iii) EXHIBIT III - engineering. This exhibit must contain the data and methodology used to calculate the CGSA and service area boundary.

(iv) EXHIBIT IV - channel plan. This exhibit must show which specific channels (or groups) are to be used at each cell site. Any necessary table for converting channel numbers to center frequencies must be provided.

(v) EXHIBIT V - ownership information. This exhibit must contain the information required by § 22.108. Additionally, individual applicants must disclose, in this exhibit, all interests (including those less than 5%) in publicly traded corporation(s) that have applications which are mutually exclusive with the individual's application.

(vi) EXHIBIT VI - service proposal. This exhibit must describe the services proposed for subscribers and roamers, including the proposed method for handling complaints.

(vii) EXHIBIT VII - cellular design. This exhibit must show that the proposed system design complies with the Commission's cellular system design concepts, and must describe the method proposed to expand the system in a coordinated fashion as necessary to address changing demand for cellular service.

(viii) EXHIBIT VIII - blocking level. This exhibit must disclose the blocking probability or other criteria to be used to determine whether it is necessary to take measures to increase system capacity to maintain service quality.

(ix) EXHIBIT IX - start-up expenses. This exhibit must disclose in detail the projected cost of construction and other initial expenses of the proposed system, and how the applicant intends to meet these expenses and the costs of operation for the first year.

(x) EXHIBIT X - interconnection arrangements. This exhibit is required for applicants that provide public landline message telephone service in any portion of the proposed CGSA. This exhibit must describe exactly how the proposed system would interconnect with the landline network. The description must be of sufficient detail to enable a competitor to connect with the landline system in exactly the same manner, if the competitor so chooses.

§ 22.955 Canadian condition.

Pursuant to an agreement between the Commission and the Department of Communications in Canada, authorizations for cellular systems within 72 kilometers (45 miles) of the U.S.-Canadian border must have the following condition attached:

This authorization is subject to the condition that, in the event that cellular systems using the same channel block as granted herein are authorized in adjacent territory in Canada, coordination of any of your transmitter installations which are within 72 kilometers (45 miles) of the U.S.-Canadian border shall be required to eliminate any harmful interference that might otherwise exist and to insure continuance of equal access to the channel block by both countries.

§ 22.957 Mexican condition.

Pursuant to an agreement between the United States and Mexico, Commission authorizations for cellular systems within 72 kilometers (45 miles) of the United States-Mexican border must have the following condition attached:

This authorization is subject to the condition that, in the event cellular systems using the same frequencies granted herein are authorized in adjacent territory in Mexico, coordination of your transmitter installations which are within 72 kilometers (45 miles) of the United States-Mexico border shall be required to eliminate any harmful interference that might otherwise exist and to ensure continuance of equal access to the frequencies by both countries. The operator of this system shall not contract with customers in Mexico, and further, users of the system must be advised that operation of a mobile unit in Mexico is not permitted at this time without the express permission of the Mexican government. The above conditions are subject to modification pending further notice from the Commission.

§ 22.959 Rules governing processing of applications for initial systems.

Pending applications for authority to operate the first cellular system on a channel block in a market continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed.

Subpart I - Offshore Radiotelephone Service

§ 22.1001 Scope.

The rules in this subpart govern the licensing and operation of offshore radiotelephone stations. The licensing and operation of these stations and systems is also subject to rules elsewhere in this part that apply generally to the public mobile services. However, in case of conflict, the rules in this subpart govern.

§ 22.1003 Eligibility.

Offshore central station licenses may be licensed to communications common carriers. Offshore subscriber stations may be licensed to common carriers or users of the service.

§ 22.1005 Priority of service.

Facilities in the Offshore Radiotelephone Service are intended primarily for rendition of public message service between offshore subscriber and central stations. However, they may also be used to render private leased line communication service, provided that such usage does not reduce or impair the extent or quality of communication service which would be available, in the absence of private leased line service, to the general public receiving or subsequently requesting public message service from an offshore central station.

§ 22.1007 Channels for offshore radiotelephone systems.

The channels listed in this section are allocated for paired assignment to transmitters located in the specified geographical zones that provide offshore radiotelephone service. All channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

(a) Zone A - Southern Louisiana. The geographical area in Zone A is bounded as follows:

From longitude W.87°45' on the East to longitude W.94°00' on the West and from the 4.8 kilometer (3 mile) limit along the Gulf of Mexico shoreline on the North to the limit of the Outer Continental Shelf on the South.

(1) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for voice-grade general communications:

central	subscriber	central	subscriber
488.025	491.025	488.225	491.225
488.050	491.050	488.250	491.250
488.075	491.075	488.275	491.275
488.100	491.100	488.300	491.300
488.125	491.125	488.325	491.325
488.150	491.150	488.350	491.350
488.175	491.175	488.375	491.375
488.200	491.200	488.400	491.400

(2) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for voice-grade general communications and private line service:

central	subscriber	central	subscriber
488.425	491.425	488.575	491.575
488.450	491.450	488.600	491.600
488.475	491.475	488.625	491.625
488.500	491.500	488.650	491.650
488.525	491.525	488.675	491.675
488.550	491.550	488.700	491.700

(3) These channels may be assigned for use by relay stations in systems where it would be impractical to provide offshore radiotelephone service without the use of relay stations.

488.725	491.725	488.775	491.775
488.750	491.750	488.800	491.800

(4) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for emergency communications involving protection of life and property.

central	subscriber	central	subscriber
488.825	491.825	488.875	491.875
488.850	491.850	488.900	491.900

(5) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for emergency auto alarm and voice transmission pertaining to emergency conditions only.

central	subscriber
488.950	491.950

(6) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for emergency shut-off remote control telemetry, environmental data acquisition and dissemination, or facsimile transmissions.

central	subscriber	central	subscriber
489.000	492.000	489.200	492.200
489.025	492.025	489.225	492.225
489.050	492.050	489.250	492.250
489.075	492.075	489.275	492.275
489.100	492.100	489.300	492.300
489.125	492.125	489.325	492.325
489.150	492.150	489.350	492.350
489.175	492.175	489.375	492.375

(7) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for private line service:

central	subscriber	central	subscriber
489.400	492.400	489.725	492.725
489.425	492.425	489.750	492.750
489.450	492.450	489.775	492.775
489.475	492.475	489.800	492.800
489.500	492.500	489.825	492.825
489.525	492.525	489.850	492.850
489.550	492.550	489.875	492.875
489.575	492.575	489.900	492.900
489.600	492.600	489.925	492.925
489.625	492.625	489.950	492.950
489.650	492.650	489.975	492.975
489.675	492.675	490.000	493.000
489.700	492.700		

(8) Interstitial channels. Interstitial channels are those with center frequencies offset by ±12.5 kHz from the listed center frequencies. The Commission may assign interstitial channels to offshore stations in Zone A subject to the following conditions:

(i) Offshore stations transmitting on interstitial channels must be located east of W.92° longitude.

(ii) Operations on interstitial channels are considered to be secondary to operations on channels with the listed center frequencies.

(iii) Offshore stations operating on interstitial channels must be used only for voice grade general communications or to provide for private line service.

Note: These channels are contained in UHF TV channel 17.

(b) Zone B - Southern Louisiana - Texas. The geographical area in Zone B is bounded as follows:

From longitude W.87°45' on the East to longitude W.95°00' on the West and from the 4.8 kilometer (3 mile) limit along the Gulf of Mexico shoreline on the North to the limit of the Outer Continental Shelf on the South.

These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for voice-grade general communications and private line service:

central	subscriber	central	subscriber
485.025	482.025	486.025	483.025
485.050	482.050	486.050	483.050
485.075	482.075	486.075	483.075
485.100	482.100	486.100	483.100
485.125	482.125	486.125	483.125
485.150	482.150	486.150	483.150
485.175	482.175	486.175	483.175
485.200	482.200	486.200	483.200
485.225	482.225	486.225	483.225
485.250	482.250	486.250	483.250
485.275	482.275	486.275	483.275
485.300	482.300	486.300	483.300
485.325	482.325	486.325	483.325
485.350	482.350	486.350	483.350
485.375	482.375	486.375	483.375
485.400	482.400	486.400	483.400
485.425	482.425	486.425	483.425
485.450	482.450	486.450	483.450
485.475	482.475	486.475	483.475
485.500	482.500	486.500	483.500
485.525	482.525	486.525	483.525
485.550	482.550	486.550	483.550
485.575	482.575	486.575	483.575
485.600	482.600	486.600	483.600
485.625	482.625	486.625	483.625
485.650	482.650	486.650	483.650
485.675	482.675	486.675	483.675
485.700	482.700	486.700	483.700
485.725	482.725	486.725	483.725
485.750	482.750	486.750	483.750
485.775	482.775	486.775	483.775
485.800	482.800	486.800	483.800
485.825	482.825	486.825	483.825
485.850	482.850	486.850	483.850
485.875	482.875	486.875	483.875
485.900	482.900	486.900	483.900
485.925	482.925	486.925	483.925
485.950	482.950	486.950	483.950
485.975	482.975	486.975	483.975
486.000	483.000	477.050	480.050

Note: These channels are contained in UHF TV channel 16.

(c) Zone C - Southern Texas. The geographical area in Zone C is bounded as follows:

Longitude W.94°00' on the East, the 4.8 kilometer (3 mile) limit on the North and West, a 282 kilometer (175 mile) radius from the reference point at Linares, N.L., Mexico on the Southwest, latitude N.26°00' on the South, and the limits of

the outer continental shelf on the Southeast.

(1) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for emergency auto alarm and voice transmission pertaining to emergency conditions only.

central	subscriber
476.950	479.950

(2) These channels may be assigned for use by offshore central (base/fixed) or subscriber stations (fixed, temporary fixed, surface and/or airborne mobile) as indicated, for voice-grade general communications and private line service:

476.025 ..... 479.025	477.075 ..... 480.075
476.050 ..... 479.050	477.100 ..... 480.100
476.075 ..... 479.075	477.125 ..... 480.125
476.100 ..... 479.100	477.150 ..... 480.150
476.125 ..... 479.125	477.175 ..... 480.175
476.150 ..... 479.150	477.200 ..... 480.200
476.175 ..... 479.175	477.225 ..... 480.225
476.200 ..... 479.200	477.250 ..... 480.250
476.225 ..... 479.225	477.275 ..... 480.275
476.250 ..... 479.250	477.300 ..... 480.300
476.275 ..... 479.275	477.325 ..... 480.325
476.300 ..... 479.300	477.350 ..... 480.350
476.325 ..... 479.325	477.375 ..... 480.375
476.350 ..... 479.350	477.400 ..... 480.400
476.375 ..... 479.375	477.425 ..... 480.425
476.400 ..... 479.400	477.450 ..... 480.450
476.425 ..... 479.425	477.475 ..... 480.475
476.450 ..... 479.450	477.500 ..... 480.500
476.475 ..... 479.475	477.525 ..... 480.525
476.500 ..... 479.500	477.550 ..... 480.550
476.525 ..... 479.525	477.575 ..... 480.575
476.550 ..... 479.550	477.600 ..... 480.600
476.575 ..... 479.575	477.625 ..... 480.625
476.600 ..... 479.600	477.650 ..... 480.650
476.625 ..... 479.625	477.675 ..... 480.675
476.650 ..... 479.650	477.700 ..... 480.700
476.675 ..... 479.675	477.725 ..... 480.725
476.700 ..... 479.700	477.750 ..... 480.750
476.725 ..... 479.725	477.775 ..... 480.775
476.750 ..... 479.750	477.800 ..... 480.800
476.775 ..... 479.775	477.825 ..... 480.825
476.800 ..... 479.800	477.850 ..... 480.850
476.825 ..... 479.825	477.875 ..... 480.875
476.850 ..... 479.850	477.900 ..... 480.900
476.875 ..... 479.875	477.925 ..... 480.925
476.900 ..... 479.900	477.950 ..... 480.950
477.000 ..... 480.000	477.975 ..... 480.975
477.025 ..... 480.025	

§ 22.1009 Transmitter locations.

The rules in this section establish limitations on the locations from which stations in the Offshore Radiotelephone Service may transmit.

(a) All stations. Offshore stations must not transmit from locations outside the boundaries of the appropriate Zones specified in § 22.1007. Offshore stations must not transmit from locations within 241 kilometers (150 miles) of any full-service television station that transmits on the TV channel containing the channel on which the offshore station transmits.

(b) Airborne subscriber stations. Airborne subscriber stations must not transmit from altitudes exceeding 305 meters (1000 feet) above mean sea level. Airborne mobile stations in Zone A must not transmit from locations within 129 kilometers (80 miles) of Lake Charles, Louisiana. Airborne mobile stations in Zone B must not transmit from locations within 129 kilometers (80 miles) of Lafayette, Louisiana. Airborne mobile stations in Zone C must not transmit from locations within 129 kilometers (80 mile) of Corpus Christi or locations within 129 kilometers (80 miles) of Houston, Texas.

§ 22.1011 Antenna height limitations.

The antenna height of offshore stations must not exceed 61 meters (200 feet) above mean sea level. The antenna height of offshore surface mobile stations must not exceed 10 meters (30 feet) above the waterline.

§ 22.1013 Effective radiated power limitations.

The effective radiated power (ERP) of transmitters in the Offshore Radiotelephone Service must not exceed the limits in this section.

(a) Maximum power. The ERP of transmitters in this service must not exceed 1000 Watts under any circumstances.

(b) Mobile transmitters. The ERP of mobile transmitters must not exceed 100 Watts. The ERP of mobile transmitters, when located within 32 kilometers (20 miles) of the 4.8 kilometer (3 mile) limit, must not exceed 25 Watts. The ERP of airborne mobile stations must not exceed 1 Watt.

(c) Protection for TV Reception. The ERP limitations in this paragraph are intended to reduce the likelihood that interference to television reception from offshore radiotelephone operations will occur.

(1) Co-channel protection. The ERP of offshore stations must not exceed the limits in Table I-1. The limits depend upon the height above mean sea level of the offshore transmitting antenna and the distance between the antenna location of the offshore transmitter and the antenna location of the main transmitter of the nearest full-service television station that transmits on the TV channel containing the channel on which the offshore station transmits.

(2) Adjacent channel protection. The ERP of offshore stations located within 128.8 kilometers (80 miles) of the main transmitter antenna of a full service TV station that transmits on a TV channel adjacent to the TV channel which contains the channel on which the offshore station transmits must not exceed the limits in the Table I-2. The limits depend upon the height above mean sea level of the offshore transmitting antenna and the distance between the location of the offshore transmitter and the 4.8 kilometer (3 mile) limit.

§ 22.1015 Repeater operation.

Offshore central stations may be used as repeater stations provided that the licensee is able to maintain control of the station, and in particular, to turn the transmitter off, regardless of whether associated subscriber stations are transmitting at the time.

§ 22.1025 Permissible communications.

Offshore central stations must communicate only with subscriber stations (fixed, temporary-fixed, mobile and airborne). Offshore subscriber stations must normally communicate only with and through offshore central stations. Stations in the Offshore Radiotelephone Service may communicate through relay stations authorized in this service.

§ 22.1031 Temporary fixed stations.

The Commission may, upon proper application therefor, authorize the construction and operation of temporary fixed stations in the Offshore Radiotelephone service to be used only when the service of permanent fixed stations is disrupted by storms or emergencies or is otherwise unavailable.

(a) Six month limitation. If it is necessary for a temporary fixed station to remain at the same location for more than six months, the licensee of that station must apply for authorization to operate the station at the specific location at least 30 days before the end of the six month period.

(b) International communications. Communications between the United States and Mexico must not be carried out using a temporary fixed station without prior authorization from the Commission. Licensees desiring to carry out such communications should apply sufficiently in advance to allow for the time necessary to coordinate with Canada or Mexico.

§ 22.1035 Construction period.

The construction period (see § 22.142) for offshore stations is 18 months.

§ 22.1037 Application requirements for offshore stations.

Applications for new Offshore Radiotelephone Service stations must contain an exhibit showing that:

(a) the applicant has notified all licensees of offshore stations located within 321.8 km (200 miles) of the proposed offshore station, by providing the data in paragraph (a) of this section, at least thirty days before filing the application:

(1) The name, business address, channel coordinator, and telephone number of the applicant.

(2) The location and geographical coordinates of the proposed station.

(3) The channel and type of emission.

(4) The height and type of antenna.

(5) The bearing of the main lobe of the antenna.

(6) The effective radiated power.

(b) the proposed station will not interfere with the primary ORS channels by compliance with the following separations:

Table I-1 - Maximum ERP (Watts)

Distance	30 meters (100 feet)	45 meters (150 feet)	61 meters (200 feet)
338 km (210 mi)	1000	1000	1000
330 km (205 mi)	1000	900	800
322 km (200 mi)	800	710	630
314 km (195 mi)	590	520	450
306 km (190 mi)	450	400	330
298 km (185 mi)	320	280	240
290 km (180 mi)	250	210	175
282 km (175 mi)	180	150	130
274 km (170 mi)	175	110	100
266 km (165 mi)	95	80	70
258 km (160 mi)	65	55	50
249 km (155 mi)	50	40	35
241 km (150 mi)	35	30	25

Table I-2 - Maximum ERP (Watts)

Distance from the 4.8 km (3 mi) limit	30 meters (100 feet)	61 meters (200 feet)
6.4 km (4 mi)	25	6
8.0 km (5 mi)	40	10
9.7 km (6 mi)	65	15
11.3 km (7 mi)	100	25
12.9 km (8 mi)	150	35
14.5 km (9 mi)	215	50
16.1 km (10 mi)	295	70
17.7 km (11 mi)	400	100
19.3 km (12 mi)	530	130
20.9 km (13 mi)	685	170
22.5 km (14 mi)	870	215
24.1 km (15 mi)	1000	270
25.7 km (16 mi)	1000	415
27.4 km (17 mi)	1000	505
29.0 km (18 mi)	1000	610
30.6 km (19 mi)	1000	730
32.2 km (20 mi)	1000	865
33.8 km (21 mi)	1000	1000

(1) co-channel to a distance of 241.4 km (150 miles).

(2) if interstitial channels are used, adjacent channels (±12.5 kHz) to a distance of 80.5 km (50 miles).

(3) third order intermodulation channels (±12.5 kHz) to a distance of 32.2 km (20 miles).

(4) if the proposed transmitting antenna site is located west of longitude W.93°40', and within 32.2 km (20 miles) of the shoreline, and proposes use of the channels listed in § 22.1007(b), no third-order intermodulation interference would be caused to any base or mobile station using the channels between 488 and 494 MHz.

APPENDIX C

Rules Cross-reference Table

CURRENT RULE	PROPOSED RULE
22.0 (a) and (b)	22.1
22.0 (c), (d) and (e)	(REMOVED)
22.1	(REMOVED)
22.2	22.99
22.3	22.3
22.4 (a)	22.7
22.4 (b)	22.5
22.5	22.105
22.6 (a)	22.105 (c)
22.6 (b) and (e)	22.106
22.6 (c)	22.105 (f)
22.6 (d)	22.105 (d)
22.9 (a) and (b)	22.105 (c)
22.9 (c)(1)	22.3 (b)
22.9 (c)(2)	22.821
22.9 (d)	22.163
22.11	22.105
22.11 (b)	22.145
22.13 (a)(1)	22.108
22.13 (a)(2)-(a)(6)	22.107
22.13 (b)	22.115 (b)
22.13 (c) and (d)	(REMOVED)
22.13 (f)	22.109
22.15	22.115
22.15 (b)(1)(i) and (b)(1)(iii)	22.559
22.15 (b)(1)(ii) and (b)(1)(iii)	22.589
22.15 (b)(2) (paging)	22.537
22.15 (b)(2) (two-way)	22.567
22.15 (c)(1)	22.115 (a)(2)
22.15 (c)(2)	22.115 (a)(3)
22.15 (i)(2)	22.529 (a)(3)
22.15 (i)(3)	22.821
22.15 (j) and (k) (general)	22.115 (a)(4)
22.15 (j) and (k) (paging)	22.529
22.15 (l)	22.1037
22.15 (m) and (n)	(REMOVED)
22.16	(REMOVED)
22.19	22.119
22.20 (a)	22.128 (c)
22.20 (b)	(REMOVED)
22.20 (d)	22.128 (b)
22.21	22.121 (a)
22.22	22.121 (b) and (c)
22.23 (a), (b), (d) and (f)	22.122
22.23 (c)	22.123
22.23 (e)	(REMOVED)
22.23 (g)(1), (g)2), (g)(4), (g)(6) and (g)(7)	(REMOVED)
22.23 (g)(3)	22.123 (a)
22.23 (g)(5)	22.123 (f)
22.23 (h)	(REMOVED)
22.25	22.125
22.26	22.124
22.27	22.120
22.27	22.127
22.27 (b)(1)	22.132
22.27 (b)(2)	(REMOVED)
22.27 (c)	(REMOVED)
22.28	22.128
22.29	22.129
22.30	22.130
22.31	22.131
22.32	22.132
22.33 (a)	22.133
22.33 (b) and (c)	(REMOVED)
22.35	(REMOVED)
22.39	22.137
22.40 (a) and (b)	22.139
22.40 (c)	22.137 (d)(3)
22.43 (a)(1)	22.143
22.43 (a)(2) (Offshore)	22.1035
22.43 (a)(2) (Paging)	22.511
22.43 (a)(2) (Rural)	22.713
22.43 (a)(2) (Air-ground)	22.815
22.43 (a)(2) (Cellular)	22.946 (b)(2)
22.43 (a)(3)	22.142
22.43 (b)	22.142 (c) and (d)
22.43 (c)(1) and (c)(5)	22.946 (b)(1)
22.43 (c)(2)	22.946 (a)
22.43 (c)(3)	22.946 (c)
22.43 (c)(4)	22.142
22.43 (d)	22.143
22.43 (e)	22.873
22.44	22.144
22.45	(REMOVED)
22.100 (a)	22.351
22.100 (b)	22.352
22.100 (c)	22.352 (c)(5)
22.100 (d)	22.601
22.100 (d)(1)-(d)(11)	22.150
22.100 (e)	22.353
22.101	22.355
22.104 (a)(1), (a)(2) and (a)(4)	22.357
22.104 (a)(3)	22.161
22.104 (b)(1)	22.357 (a)
22.104 (b)(2)	22.357 (b)(3)
22.105	22.357
22.106	22.359
22.107	22.361
22.108	22.363
22.109	22.365
22.110	22.367
22.113	22.369
22.115	22.159
22.117 (a)	22.373 (a)-(d)
22.117 (b) and (c)	22.165
22.119	22.375
22.120	22.377
22.121	22.379
22.200	22.301
22.201	22.303
22.205	22.305
22.210	22.307
22.212	(REMOVED)
22.213	22.313
22.302	22.315
22.303	22.317
22.304	(REMOVED)
22.307	22.321
22.308	22.323
22.309	22.103
22.400	22.401
22.401	22.401

CURRENT RULE	PROPOSED RULE
22.402	22.409 (e)
22.403	22.409
22.404	22.403
22.405	22.409 (c)
22.406	22.409 (f)
22.407	22.409 (h)
22.500 (a)	22.7
22.500 (b) and (c)	22.3 (b)
22.501 (a)(1), (a)(4), (d), (h), (p)(1)	22.531
22.501 (a)(2) and (a)(3)	(REMOVED)
22.501 (a)(5)	22.411
22.501 (b) and (i)(1)	22.561
22.501 (c)	22.563
22.501 (e), (f) and (m)	22.591
22.501 (f)(1)	22.599
22.501 (f)(1)(ii)	22.413
22.501 (f)(2)	22.593
22.501 (g)(1), (g)(2) and (k)(4)	22.621
22.501 (g)(3) and (k)	22.625
22.501 (i)(2)	22.565 (a)
22.501 (i)(3)	(REMOVED)
22.501 (j)	22.651
22.501 (j)(1)	22.653
22.501 (j)(2)	22.655
22.501 (j)(3), (j)(4) and (j)(6)	22.657
22.501 (j)(5), (j)(6) and (j)(7)	22.659
22.501 (k)	22.623 (b)
22.501 (k)(1) and (k)(3)	22.625 (b)(1)
22.501 (k)(2)	22.627 (a)
22.501 (k)(5)(i), (k)(5)(iii) and (k)(5)(iv)	22.627 (b)
22.501 (k)(5)(ii)	22.625 (b)(2)
22.501 (k)(6)	22.621 (c)
22.501 (m)	22.603
22.501 (m)(4)	22.150
22.501 (n)	22.603
22.501 (p)(2)(i)	22.533
22.501 (p)(2)(ii)	22.551 (a)
22.502	(REMOVED)
22.503	(REMOVED)
22.504 (a) (paging)	22.537 (c)
22.504 (a) (two-way)	22.567 (a)(3) and (a)(5)
22.504 (b)(1) (including charts)	(REMOVED)
22.504 (b)(2)	22.537 (e) and (f)
22.504 (c)	(REMOVED)
22.505 (a) and (b) (paging)	22.535 (c)
22.505 (a) (two-way)	22.565 (c)
22.505 (c) (paging)	22.535 (d)
22.505 (c) (two-way)	22.565 (d)
22.505 (c)(1)	(REMOVED)
22.505 (c)(2) (nationwide paging)	22.535 (e)
22.505 (c)(2) (931 MHz, except nationwide)	22.535 (d)
22.505 (c)(3) (paging)	22.559 (b)
22.505 (c)(3) (two-way)	22.589 (b)
22.506 (a) (paging)	22.535 (b)
22.506 (a) (two-way)	22.565 (b)
22.506 (b)	22.565 (g)
22.506 (c)	22.565 (f)
22.506 (d) (power)	22.809 (a) and (b)
22.506 (d) (idle tone)	22.811
22.506 (e)	22.535 (b)
22.506 (f) (paging)	22.535 (a)
22.506 (f) (two-way)	22.565 (a)
22.506 (f)(1) (paging)	22.535 (f)

CURRENT RULE	PROPOSED RULE
22.506 (f)(1) (two-way)	22.565 (e)
22.506 (f)(2) (nationwide paging)	22.535 (e)
22.506 (f)(2) (931 MHz, except nationwide)	22.535 (d)
22.506 (f)(3) (paging)	22.559 (b)
22.506 (f)(3) (two-way)	22.589 (b)
22.508 (a), (c) and (e)-(i)	(REMOVED)
22.508 (b)	22.811
22.508 (d)	22.357 (d)
22.509 (a) and (b)	22.515
22.509 (c)	22.577 (c)
22.509 (d)	22.381
22.509 (e)	22.579
22.509 (f)	(REMOVED)
22.514	22.571
22.515	22.325
22.516	(REMOVED)
22.517	22.573
22.518	22.575
22.519	22.577
22.521 (a)	22.805
22.521 (b) (allotment table)	(REMOVED)
22.521 (c) (power limits)	22.809
22.521 (c) (idle tone)	22.811
22.521 (d)	(REMOVED)
22.522	(REMOVED)
22.523	(REMOVED)
22.524	22.381
22.525 (a)	22.539 (c)
22.525 (b)	22.539 (d)
22.525 (c)	22.539 (e)
22.525 (d)	(REMOVED)
22.525 (e)	22.539 (b) and (f)
22.525 (f)	22.539 (a)
22.527	22.551
22.600 (eligibility)	22.702
22.600 (subscriber authorizations)	22.703
22.601 (a)(1) and (b)	22.575
22.601 (a)(2) and (c)	22.757
22.601 (a)(4)	(REMOVED)
22.601 (f)	22.725 (b)
22.601 (g)	22.729
22.604	22.731
22.605 (a),(b) and (d)-(g)	(REMOVED)
22.605 (c)	22.357 (d)
22.606	22.705
22.607	22.733
22.608	22.709
22.609 (e)	22.711
22.610	22.737
22.900	22.900
22.901 (a)	22.7
22.901 (b), (c) and (d)	22.903
22.902 (a)-(c)	22.905
22.902 (d)	22.907
22.902 (e)	22.933
22.903	22.911
22.904	22.913 (a)
22.905	22.913 (b)
22.906	22.915
22.907	22.917
22.908	22.373
22.909	22.325
22.910	22.313 (a)(1)

CURRENT RULE	PROPOSED RULE
22.911 (a), (b) and (c)	22.923
22.911 (a)(1)	22.925
22.911 (d)	22.901 (c)
22.912	22.927
22.913	(REMOVED)
22.914	22.901 (a) and (b)
22.915	22.933
22.916 (a) and (c)	(REMOVED)
22.916 (b)(5)-(b)(8)	22.935
22.917	22.937
22.918 (a), (b) and (d)	(REMOVED)
22.918 (c)	22.939
22.919	(REMOVED)
22.920 (a) and (b)	22.943 (c)
22.920 (c)	22.943 (a)
22.921	22.945
22.922	22.943 (b)
22.923	(REMOVED)
22.924 (a)	22.949 (a) and (b)
22.924 (a)(1) and (a)(2)	22.951
22.924 (b)	22.953
22.925	22.947 (c)
22.926 (applications)	22.953 (a)(5)(i)
22.926 (system information update)	22.947 (c)(1)
22.930	22.901 (d)
22.1000	22.1003
22.1001	22.1007
22.1001 (a), (b) and (c)	22.1007 (a), (b) and (c)
22.1001 (d)(1)	22.1009 (a)
22.1001 (d)(2)	22.1013 (c)(1)
22.1001 (d)(3)	22.1013 (c)(2)
22.1001 (d)(4)	22.1009 (b)
22.1001 (d)(5)	22.1011
22.1001 (d)(6)	22.1013 (b)
22.1001 (d)(7)	22.1015
22.1002	22.1013
22.1003	22.1007
22.1004 (a) and (b)	22.357 (d)
22.1004 (c)	(REMOVED)
22.1004 (d) and (e)	22.359
22.1005	22.1025
22.1006	22.1031
22.1008	22.1005
22.1100	22.801
22.1101	22.7
22.1102	22.875
22.1105	22.857
22.1107 (a) and (b)	22.857 (a) and (b)
22.1109	22.859
22.1111	22.861
22.1113	22.863
22.1115	22.865
22.1117	22.867
22.1119	22.869
22.1121	22.871
(NEW)	22.1001
(NEW)	22.103
(NEW)	22.105 (g)
(NEW)	22.129
(NEW)	22.130
(NEW)	22.147
(NEW)	22.157
(NEW)	22.167

CURRENT RULE	PROPOSED RULE
(NEW)	22.371
(NEW)	22.5
(NEW)	22.507
(NEW)	22.509
(NEW)	22.513
(NEW)	22.537
(NEW)	22.539
(NEW)	22.567
(NEW)	22.569
(NEW)	22.701
(NEW)	22.717
(NEW)	22.801
(NEW)	22.813
(NEW)	22.817
(NEW)	22.819
(NEW)	22.919
(NEW)	22.941
(NEW)	22.949
(NEW)	22.951
(NEW)	22.953
(NEW)	22.959

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